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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CASES CITED AND AN INDEX.

By FRANCIS M. DICE,
OFFICIAL REPORTER.

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JUDGES

OF THE

SUPREME COURT

OF THE

STATE OF INDIANA,

DURING THE TIME OF THESE REPORTS.

HON. BYRON K. ELLIOTT.*†

HON. JAMES L. WORDEN.‡§

HON. WILLIAM A. WOODS.†

HON. WILLIAM E. NIBLACK.§

HON. GEORGE V. HOWK.§

*Chief Justice at the November Term, 1881.

†Term of office commenced January 3d, 1881.

‡Chief Justice at the May Term, 1882.

§Term of office commenced January 1st, 1877.

SUPREME COURT COMMISSIONERS

OF THE

STATE OF INDIANA.

HON. GEORGE A. BICKNELL.*†

HON. JOHN MORRIS.†

HON. WILLIAM M. FRANKLIN.†

HON. JAMES I. BEST.†

HON. HORATIO C. NEWCOMB.†‡

HON. JAMES B. BLACK.§

* Chief Commissioner.
† Appointed April 27th, 1881.
‡ Died May 23d, 1882.
§ Appointed May 29th, 1882, to succeed Hon. HORATIO C. NEWCOMB.

OFFICERS

OF THE

SUPREME COURT.

CLERK,

JONATHAN W. GORDON.

SHERIFF,

JAMES ELDER.

LIBRARIAN,

FREDERICK HEINER.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, NOVEMBER TERM, 1881, IN THE SIXTY-SIXTH YEAR OF THE STATE.

No. 8870.

HERBERT *v.* BERRIER ET AL.

WILL.—*Attestation.*—The attestation of a will thus, "Signed and sealed in the presence of," etc., followed by the signatures of two witnesses, is sufficient in form.

SAME.—*Execution.*—If one who subscribes a will as an attesting witness is competent for that purpose, he is a fit person to write the testator's name thereto at his request.

SAME.—*Attesting Witnesses.*—*Signature.*—Proof, in the absence of a contest, of the genuineness of the signatures of the attesting witnesses, and that they are dead or non-residents of the State, or can not be found, and that they attested it at the testator's request, and in his presence, and that one of them wrote the testator's name at his request, and that the subscribing witnesses in person wrote their own names in his presence, is sufficient.

SAME.—*Testator's Capacity.*—*Presumption.*—*Statute Construed.*—Express proof of the capacity of the testator to make a will, and of his freedom from coercion, when no contest is pending, is not required by the statute, R. S. 1881, section 2587. This, in the absence of proof, is presumed.

SAME.—*Competency of Witnesses.*—The competency of the attesting witnesses to a will will be presumed until the contrary is shown.

SAME.—*Pleading.*—A complaint to overthrow a will, which alleges generally that "the will has been admitted to probate unlawfully and without sufficient proof," is too vague and uncertain.

From the Porter Circuit Court.

W. E. Pinney, for appellant.

J. Bradley and *J. H. Bradley*, for appellees.

ELLIOTT, C. J.—This case was tried upon an agreed statement of facts. We extract from the statement such facts as are essential to a proper understanding of the questions presented by this appeal.

On the 3d day of October, 1848, John Berrier, Sen., executed an instrument purporting to be his will. To the instrument is affixed the signature of Berrier, and following it is written, "Signed and sealed in the presence of Alonzo Whitcomb, Esq., Elisha Keith." John Berrier, Sen., died on the 6th day of January, 1872, leaving both real and personal property. On the 6th day of February, 1872, the instrument was produced to the clerk of Porter county, and by him admitted to probate. Proof of the execution of the will was made by the affidavits of Edney L. Whitcomb, Salome Kouts and Perry C. Kouts. The affidavit of Edney L. Whitcomb stated that he was the son of Alonzo Whitcomb, who was a subscribing witness to the will of John Berrier, Sen.; that the said Alonzo is dead; that the affiant was well acquainted with the subscribing witness' handwriting, and that the signature attached to the will "is the genuine signature of Alonzo Whitcomb." The affidavit of Salome Kouts stated that she nursed Berrier (who was ill at the time the will was executed); that she was present when the will was signed; that Alonzo Whitcomb and Elisha Keith subscribed their names as attesting witnesses at the testator's request, and that the will produced by the proponents was the identical will so signed and attested. Perry C. Kouts states, in his affidavit, that he has made diligent search and enquiries, and can get no information that will enable him to find the residence of Elisha Keith, and that he has reason to believe, and does believe, that Keith is not a resident of the State of Indiana.

A will must be executed in accordance with the law. Upon this point there can not well be two opinions. *Patterson* v. *Ransom*, 55 Ind. 402.

Our first work is to ascertain whether the instrument, about which this contest is waged, was executed in conformity to the

requirements of the law. The law in force at the time the will was signed provided that no will should be effectual to pass any estate unless it was in writing, and signed by the testator, or some person in his presence, and by his express direction, and subscribed in his presence by two or more competent witnesses. R. S. 1843, p. 491. The law in force at the time of Berrier's death was substantially the same, as to the attestation of a will, as that in force when the will was signed and attested. 2 R. S. 1876, p. 572.

We think the evidence adduced by the proponents at the time the will was offered for probate shows that the signature of Berrier was written to the will upon his express direction. This is a sufficient compliance with the requirement of the law, that the will shall be signed by the testator, or by some one by his direction. It is not necessary that it should be shown that the testator was incapacitated by illness or otherwise from affixing his own name to the instrument. It is enough if it appears that he directed the person who wrote his name to do it, in execution of his purpose to make a will.

The testator's name may be written by one of the subscribing witnesses. If the person who subscribes as a witness is competent for that purpose, he is a fit person to write the testator's name at his request. *Smith* v. *Harris*, 1 Rob. Ec. 262; *Robins* v. *Coryell*, 27 Barb. 556. The evidence adduced also shows that the testator expressly acknowledged, in the presence of the subscribing witnesses, the execution of the will, and this is an adoption of the act of the person who signed for him. *Haynes* v. *Haynes*, 1 Am. Prob. Rep. 263; *Turner* v. *Cook*, 36 Ind. 129.

The attestation is sufficient in form. No precise form is required. It will be sufficient if that adopted shows that the testator's signature was affixed in the presence of the witnesses. There are, indeed, many cases holding that no attestation clause is necessary. 3 Jarman Wills, 5th Am. ed., p. 763, authorities in note.

The proponent of a will is not bound to prove, in the first

instance, that the subscribing witnesses were competent. The presumption is in favor of their competency, and this prevails until overcome by evidence or countervailing presumptions.

It is not necessary to prove a formal request to the witnesses. It is enough to show that the will was subscribed to as such by the testator in their presence, and by them as witnesses in the conscious presence of the testator. *Matter of the Will* of *Allen*, 1 Am. Prob. R. 580. See also authorities cited in note to *Mandeville* v. *Parker*, 1 Am. Prob. R. 106; *Turner* v. *Cook*, 36 Ind. 129; *Brown* v. *McAlister*, 34 Ind. 375; *McElfresh* v. *Guard*, 32 Ind. 408; *Cheatham* v. *Hatcher*, 32 Am. R. 650.

Proof of the genuineness of the signatures of the attesting witnesses was properly made by proving their handwriting. It may be inferred from evidence of handwriting, that signatures are genuine. A party who shows that a name is in the handwriting of the person whose signature is in question, has a right, in the absence of anything to the contrary, to have an inference of its genuineness made in his favor. Nothing being shown to the contrary, it was proper to infer from evidence that the signatures were in the handwriting of the persons whose names were annexed as subscribing witnesses, that the signatures were written by them. But, if this was not so, the affidavit of one of the witnesses shows that the subscribing witnesses affixed their signatures in her presence, as well as in that of the testator, so that there can be no doubt as to the genuineness of their signatures.

Judge Redfield says that "The general rule is that the capacity to execute wills extends to all." 1 Redf. Wills, 8. In *Sloan* v. *Maxwell*, 2 Green Ch. (N. J.) 563, it was said, that it is a "fixed principle, that whenever the formal execution of a will is duly proved, he who wishes to impeach it on the ground of incompetency, must support by proof the allegation he makes, and thereby overcome the presumption which the law raises of the sanity of the testator." *Rush* v. *Megee*, 36 Ind. 69; *Banker* v. *Banker*, 63 N. Y. 409; *Baxter* v. *Abbott*, 7 Gray, 71. The appellant contends that our statute requires that affirmative

evidence of testamentary capacity must be adduced before the will can be admitted to probate. The basis of this contention is supplied by section 30 of the act concerning wills, which reads thus: "If it shall appear from the proof taken, that the will was duly executed, the testator at the time of executing the same competent to devise his property, and not under coercion, such testimony shall be written down, subscribed by the witness examined, and attested by said clerk with his signature and seal of office; and the will, with such testimony and attestation, shall be recorded by such clerk in a book kept for that purpose, and certified by him to be a complete record." This section is to be taken in connection with other provisions of the same act, and, when so taken, can not be construed to overturn settled rules of evidence, and to require a proponent to show, not only testamentary capacity, but also freedom from restraint. We think the natural presumption of competency must prevail, unless something countervailing it appears. In the statute defining murder, the provision expressly refers to persons of sound mind, and yet the courts have universally held that sanity is to be presumed until the contrary is made to appear. The proof of the formal execution of the will, together with the contents of the will itself, may well be held to supply grounds for inferring the competency of the testator. We can not believe that the Legislature ever intended that the proponent of a will should, in the first instance, prove sanity and freedom from coercion. The language of section 27 of the statute lends strong confirmation to this view. It is there provided: "Before a written will shall be admitted to probate or letters testamentary, or administration with the will annexed, shall be granted thereon, such will shall be proven by one or more of the subscribing witnesses, or if they be dead, out of the State, or have become incompetent from any cause since attesting such will, then by proof of the handwriting of the testator, or of the subscribing witnesses thereto." This contemplates no more than due proof of the formal execution of the will, and clearly

means that when such proof is made, the will shall be admitted to probate. It certainly does not mean that in advance of any imputation of want of capacity, or of a showing of the presence of duress or undue influence, the proponent shall give evidence of sanity and liberty of action.

We are not called upon to decide what the rule would be in case of an objection interposed before the admission to probate. If the objection had been made before probate, there would be much more force in the position, that the proponent must prove testamentary capacity and the absence of coercion. But upon this point there is great diversity of opinion; the weight of authority seems to be that even in such cases the proponent is not bound, in the first instance, to give evidence of capacity and freedom from restraint.

Where, as in the case before us, the will has been admitted to probate, is reasonable on its face, and its execution unattended by suspicious circumstances, some evidence of want of capacity and of the presence of fraud or coercion must be given by the party who attacks the will, before the party who propounds the will can be called upon to prove, what the law presumes, the presence of capacity and the absence of fraud. It would be an unnatural and strained perversion of the rules of logic to hold that a party must, where nothing is shown in opposition, proceed to establish what the law presumes; where the ultimate burden shall rest is another question.

The thirty-ninth section of the statute, giving the right to contest wills which have been admitted to probate, very clearly casts upon the complainants the burden of giving some evidence of coercion or incapacity before the party supporting the will can be required to give evidence of capacity and freedom from undue influence. This case is governed by that section, for it is an action brought to overthrow a will already admitted to probate.

The proponents proved the handwriting of the attesting witnesses, and this was sufficient under the provisions of the statute already quoted. The evidence did much more than

this, for it directly proved that the witnesses subscribed their names to the paper in the presence of the testator. The affidavit of Salome Kouts shows the actual signing by the witnesses of their names, and shows also that one of them, at the time, signed the testator's name pursuant to his request. The evidence upon this point could not well be stronger.

The statute makes express provision for proving the execution of wills where the witnesses are dead, or out of the State. The evidence brings the case fully within the provisions of the statute. It is clearly shown that one of the subscribing witnesses was dead, and that the other was out of the State and could not be found. This was amply sufficient to permit the introduction of evidence of the handwriting of the witnesses.

We have considered all the questions which can properly arise under the allegations of the complaint, and find no error in the record.

The complaint is in many respects subject to criticism. The general allegation, that "the will has been admitted to probate unlawfully and without sufficient proof," is too vague and uncertain. The defects in the proof, or the facts making the "probate unlawful," should be stated. Mere conclusions, such as that stated, are not sufficient; there should be allegations of substantive facts.

Judgment affirmed.

Petition for a rehearing overruled.

No. 10,116.

The State v. Fry.

Criminal Law.—*Ticket-Scalper.—Special Tickets.—Statute Construed.*—Section 8 of the act of March 9th, 1875, regulating the issuing and taking up of railroad tickets, etc., 1 R. S. 1876, p. 259, exempts from the operation of its provisions all special tickets, whether half-fare or excursion tickets, or special in any other respect.

SAME.—A ticket, having stamped upon its face the word "special," is *prima facie* exempt from the provisions of said act of March 9th, 1875.

From the Marion Criminal Court.

D. P. Baldwin, Attorney General, *J. B. Elam*, Prosecuting Attorney, and *W. W. Thornton*, for the State.

Z. K. McCormack, for appellee.

WORDEN, J.—This was an indictment against the appellee for selling a railroad ticket without a certificate of authority, as provided for in the act regulating the issuing and taking up of tickets and coupons of tickets by common carriers, etc., approved March 9th, 1875, 1 R. S. 1876, p. 259.

On motion of the defendant the indictment was quashed. The State excepted, and appeals.

It is alleged in the indictment that the ticket was issued by the Cincinnati, Indianapolis, St. Louis and Chicago Railroad Company, was a first-class ticket, and evidenced the right and entitled the holder to be transferred in a continuous passage over certain railroads mentioned, from the city of Indianapolis, in the State of Indiana, to the town of North Vernon, in that State, and thence to Louisville, in the State of Kentucky; that there was stamped across the face of the ticket the word "special."

The 8th section of the act above mentioned, as we find it printed in the statute book referred to, provides as follows: "The provisions of this act shall not apply to special, half-fare or excursion tickets."

It is said that in the enrolled bill, the punctuation is different, there being no comma between the words "special" and "half-fare;" and it is claimed by the State that the section should be so read as to exempt from the operation of the statute two classes of tickets only, viz.: half-fare tickets and excursion tickets.

But why exempt from the operation of the statute half-fare tickets, or excursion tickets, any more than any other tickets supplied at less than the usual full fare, whether it be more or

less than half-fare? Such special tickets may be subject to conditions not attached to usual full-fare tickets.

We think, without any particular reference to the punctuation of the statute, that the Legislature intended to exempt from the operation of it all special tickets, whether they are half-fare or excursion tickets, or special in any other respect.

From the desoription of the ticket sold by the defendant, we must regard it as a special ticket, and not within the prohibition of the statute.

The judgment below is affirmed.

81 9
124 410
81 9
136 596

No. 8981.

BRYAN *v.* MOORE ET AL.

DITCH OR DRAIN.—*Board of Commissioners.—Appeal to Circuit Court.*—Under the provisions of section 1 of the act of March 13th, 1879, to enable the owners of wet lands to drain or reclaim them, etc., the proceedings of the board of commissioners of the county, in the cases therein provided for, were judicial and not discretionary; and from all decisions of such commissioners, in such cases, any person aggrieved thereby might appeal to the circuit court of the proper county.

SAME.—*Uncertainty in Petition.—Motion in Arrest.*—An objection to the petition for a ditch or drain, on the ground of vagueness or uncertainty in the description of the route of such ditch or drain, can not be reached by a motion in arrest of judgment, but only by a motion to make such description more certain and specific.

SAME.—*Judgment of Circuit Court.—Mandate to County Board.*—In such a proceeding, it was competent for the circuit court, on an appeal thereto, under the provisions of section 5778, R. S. 1881, to send the proceeding down to the county board, with an order how to proceed, and to require such board to comply with the final determination of such court in the premises.

From the Tippecanoe Circuit Court.

J. Park, for appellant.

C. D. Jones and *A. K. Aholtz*, for appellees.

HOWK, J.—In this case, the appellees presented to the board of commissioners of Tippecanoe county, at its March term, 1880, their written application or petition, in which they prayed that a ditch might be located and constructed on the route therein described; that appraisers might be appointed, pursuant to the statute in such cases made and provided; and for all other proper relief. The appellant appeared before the county board at the same term thereof, and remonstrated against the construction of the proposed ditch, on the ground that the same was not of public utility. After a hearing then had, the county board was of the opinion that the contemplated ditch was not of public utility, and ordered that the petition be dismissed at the petitioners' costs.

From this order of dismissal, the petitioners appealed to the circuit court of the county, wherein the appellant's motions to dismiss the appeal, and to dismiss the cause, in the order named, were severally overruled, and to each of these rulings he excepted. The cause was tried by a jury, and the following verdict was returned: "We, the jury, find that the drain or ditch, contemplated and described in the petition in this case, would be a work of public utility." The appellant's motions for a new trial, and in arrest of judgment, were each overruled by the court, and to each of these decisions he excepted. Thereupon, the court adjudged that the proposed ditch was of public utility, and ordered that the cause be certified back to the county board, with directions to appoint appraisers, as required by law.

From this judgment this appeal is prosecuted, and the appellant has assigned here, as errors, the following decisions of the circuit court:

1. In overruling his motion to dismiss the appeal;
2. In overruling his motion to dismiss the cause;
3. In overruling his motion in arrest of judgment;
4. In overruling his motion to modify the judgment; and,
5. In overruling his motion to tax costs against the appellees.

We will consider and decide the several questions presented

and discussed by the appellant's counsel, and arising under these alleged errors, in the order of their assignment.

1. Did the circuit court err in overruling the appellant's motion to dismiss the appellees' appeal from the order of the county board? In this motion two causes were assigned for such dismissal:

1st. That the circuit court had no jurisdiction of the subject-matter; and,

2d. That no good and legal bond was filed, authorizing an appeal.

The appellees' petition was presented to the county board, and the proceedings thereon were had, or intended so to be, under the provisions of "An act to enable the owners of wet lands to drain and reclaim them," etc., approved March 13th, 1879. Acts 1879, p. 234 *et seq.* In section 1 of said act, it is provided that, in such a case as the one now before us, an application in writing, or petition, should be presented to the board of commissioners of the proper county, and that the applicants or petitioners should give notice of the petition or application, ten days prior to the session of such board. Section 1 of said act then proceeds as follows: "And any person, whose land is affected by said proposed ditch or drain, may come before such board and contest the public utility of the same; and if the board of county commissioners become satisfied that the work contemplated by the applicants is of public utility, they shall appoint three disinterested freeholders, appraisers. Such appraisers are to assess the lands affected, for the purpose of constructing such work, in proportion that the lands affected are benefited by such work."

The first point made by the appellant's counsel, in his brief of this cause, is, that the statutory provisions, which we have quoted, clothe the board of commissioners of the county with a discretionary power in the determination of the question, as to whether the work contemplated by the applicants is or is not of public utility. Counsel claims that the decision of this

question by the county board is final and conclusive, and that no appeal will lie therefrom to the circuit court of the county.

The argument of counsel, upon this point, is based upon the use of the word "*satisfied*," in the statute quoted. We quote from the brief of appellant's counsel, as follows: "We presume the word 'satisfied' is to be taken in its usual signification, 'having their desires fully gratified—made content;' what may gratify one, may not gratify another; what may one content, may not content another; and the subject-matter, about which the board is to become satisfied, is one about which the board would be better judges than any other."

We are not "satisfied" by the argument of counsel, and, by the use of the word quoted, we mean to say that we are not convinced, by his argument, that he has placed the proper construction upon the language of the statute. The word "satisfied" has other meanings than those quoted by counsel. What its meaning may be, in any given sentence, will depend very much upon the connection in which it may be used. The phrase, "become satisfied," as used in the statute above quoted, has a clear legal meaning, in regard to which, as it seems to us, there is little or no room for doubt. It means, as there used, that if the county board is convinced, or if the board finds that the work contemplated is of public utility, they shall appoint appraisers. The statute does not confer discretionary power, but it imposes a judicial duty upon the county board to hear and determine the question of the public utility of the contemplated work.

But the appellant's counsel says, "This is a special proceeding, for a special purpose, based upon a special statute, which gives no right of appeal from the action of the board." It is true, as counsel claims, that the statute under consideration makes no provision for an appeal from the finding and judgment of the county board upon the question of the public utility of the contemplated work. But, while this is so, it is equally true that this statute does not deny the right of appeal from such finding and judgment or decision of the

county board, to any person aggrieved thereby. In section 31 of the act of June 17th, 1852, providing for the organization of county boards, etc., it is declared that "From all decisions of such commissioners there shall be allowed an appeal to the circuit or common pleas court, by any person aggrieved." 1 R. S. 1876, p. 357.

Under this statutory provision, we are clearly of the opinion that the appellees, being aggrieved by the finding and decision of the county board, that the work contemplated by them was not of public utility, had the right to appeal therefrom to the circuit court of the county. *Hume* v. *The Little Flat Rock Draining Association*, 72 Ind. 499, on p. 503; *Houk* v. *Barthold*, 73 Ind. 21; *Grusenmeyer* v. *The City of Logansport*, 76 Ind. 549.

It follows, therefore, that the court committed no error in overruling appellant's motion to dismiss the appeal from the decision of the county board.

2. In his motion to dismiss the case the appellant assigned as cause therefor, that the appellees' petition did not describe the termini of the proposed ditch. Section 1 of the above mentioned act provided that the petition should specify, among other things, "the point of beginning and the terminus" of the proposed ditch. This requirement of the statute seems to have been strictly complied with in appellees' petition; and, therefore, appellant's motion to dismiss the case was correctly overruled. Some other supposed objections to the sufficiency of the petition are pointed out by appellant's counsel, in his brief, under this assignment of error; but these objections were not specified in the motion to dismiss the case, and therefore they are not considered.

3. Under the alleged error of the court in overruling the motion in arrest of judgment, appellant's counsel says: "There is nothing certain, but it is vague, indefinite, and the 'extent' can not be determined from the general description of the route" in the petition. We do not think that the petition is open to these objections; but, if it were, it is certain that such

objections could not be reached by a motion in arrest of judgment. As a rule, such objections could only be reached by a motion to make the pleading more certain and specific. *The Cincinnati, etc., R. R. Co.* v. *Chester*, 57 Ind. 297; *The Pennsylvania Co.* v. *Sedwick*, 59 Ind. 336. It has often been held that such objections are cured by the verdict. *Donellan* v. *Hardy*, 57 Ind. 393. The motion in arrest of judgment was properly overruled.

4. The court did not err, we think, in overruling appellant's motion to modify the judgment by striking out these words, "And this case is ordered to be certified to the board of commissioners, with directions to appoint appraisers." The statutory provisions above quoted made it the duty of the county board, when it was established, that the work contemplated was of public utility, to appoint appraisers. In section 37 of the aforesaid act of June 17th, 1852, providing for the organization of county boards, etc., in reference to an appeal from such boards to the circuit court, it is provided as follows: "Such court may make a final determination of the proceeding thus appealed, and cause the same to be executed, or may send the same down to such board, with an order how to proceed, and may require such board to comply with the final determination made by such court in the premises." 1 R. S. 1876, p. 357. It will be seen from this section of the statute, that the judgment of the court, in the particular complained of, was fully authorized by law, and we think that it was peculiarly the right and proper judgment in the case at bar.

5. The appellant has made no showing, either in the record or in his brief, why the costs of this case, or any part thereof, should be taxed against the appellees. It is said by appellant's counsel, that section 8 of the act under which the proceeding was instituted, provides that "Such applicant shall pay all the necessary expenses attending such application," etc. We do not well see how this statutory provision can be so construed as to render such applicant liable for the costs

of such unnecessary and fruitless litigation as may be forced upon him by others against his will. The motion to tax the costs of this case against the appellees was correctly overruled. *Jamieson* v. *The Board, etc., of Cass County*, 56 Ind. 466.

We find no error in the record of this cause.

The judgment is affirmed, with costs.

No. 10,020.

LOHMAN ET AL. *v.* THE STATE.

CRIMINAL LAW.—*Gift Enterprise.—Definition.—Judicial Notice.—Supreme Court.*—The Supreme Court takes judicial notice that the phrase "gift enterprise," used in sections 2077 and 2078, R. S. 1881 (Acts 1881, pp. 211, 212), means substantially a scheme for the division or distribution of certain articles of property, to be determined by chance amongst those who have taken shares in the scheme.

SAME.—*Advertising.—Information.—Duplicity.*— An information, charging that the defendant advertised an account of when and where a certain gift enterprise was to be drawn, the prizes therein, the price of a ticket, and showing where tickets might be obtained, and had at the same time given publicity to said gift enterprise by unlawfully circulating printed copies of such account, does not charge two separate and distinct offences under section 172, R. S. 1881, section 2078.

SAME.—*Price of Ticket.—Equivalent Terms.*—Announcing in the published account, set out in such information, how much money invested in a specified manner would procure a ticket, is equivalent to stating the price of the ticket.

SAME.—*Time or Place of Drawing.*—The announcement in such published account: "To every purchaser of twenty-five cents worth of goods at our drug store we will give a ticket; this ticket entitles the holder to one share in the donation to be held December 10th, 1882," is sufficient to name the time or place of the contemplated drawing.

SAME.—*Signatures to Published Account.*—In such publication, it was immaterial whether any, and, if any, whose name was signed to the published account of the scheme.

From the Noble Circuit Court.

A. A. Chapin and *R. P. Barr*, for appellants.

D. P. Baldwin, Attorney General, *W. W. Thornton* and *H. C. Peterson*, Prosecuting Attorney, for the State.

NIBLACK, J.—This was a prosecution upon affidavit and information against George H. Lohman and Harry Lohman, for advertising a gift enterprise.

The defendants made an unsuccessful motion to quash the information, after which a trial by the court resulted in finding the defendants guilty as charged, in the assessment of a fine against them, and in judgment on the finding. Error is assigned only upon the refusal of the court to quash the information.

The information charged that George H. Lohman and Harry Lohman, on the 10th day of January, 1882, at the county of Noble, in the State of Indiana, did then and there unlawfully write, advertise and publish an account of a certain gift enterprise denominated "Lohmans' First Annual Donation," then and there and therein stating when and where the same is to be drawn, the prizes therein, the price of a ticket, and showing therein where tickets in said gift enterprise may be obtained, and did then and there give publicity to such gift enterprise by unlawfully circulating a large number of printed copies of said account of said gift enterprise throughout said county and State, said account of said gift enterprise being in words and figures following: "$500 given away. Something new. Lohmans' First Annual Donation. To every purchaser of twenty-five cents worth of goods at our drug store, we will give a ticket. This ticket entitles the holder to one share in the donation to be held December 10th, 1882, and consisting of the following articles: One gent's gold watch, from Beckman's, $100; one Domestic sewing machine, $50." Here followed a considerable number of other articles, with their values attached, amounting in the aggregate to $501. "These we absolutely give away without reserve. The articles all first-class in every particular, and

make handsome presents. The manner of drawing will be decided upon by a committee selected by the ticket-holders and made known at some future time.

"G. H. LOHMAN & Co.,
"The Leading Druggists."

Contrary to the form of the statute, etc.

Section 171 of the misdemeanor act of 1881 provides that whoever sells a lottery ticket or share in any lottery scheme or gift enterprise, or acts as agent for any such scheme or enterprise, or aids or abets any person to engage in such scheme or enterprise, or transmits money to any lottery scheme or gift enterprise for the division of property, to be determined by chance, or who makes or draws any lottery scheme or gift enterprise for a division of property, not authorized by law, shall be deemed guilty of a misdemeanor. Acts 1881, p. 211. Section 172 of the same act still further provides that "Whoever writes, prints, advertises or publishes in any way an account of any lottery, gift enterprise or scheme of chance of any kind or description, by whatever name, style or title, the same may be denominated or known, stating when or where the same is to be drawn, or the prizes therein, or any of them, or the price of a ticket, or showing therein where any ticket may be obtained, or in any way giving publicity to such lottery, gift enterprise or scheme of chance, shall be fined not more than five hundred dollars nor less than ten dollars."

The first objection urged to the information is that there is nothing, whether in the dictionaries, in the text-books, in the decided cases, or in our statutes, giving either an authorized or an established definition of the phrase "gift enterprise," and that hence our courts can not judicially know what is meant by the use of that phrase.

We think this objection can not be sustained. In common parlance, a gift enterprise is understood to be substantially a scheme for the division or distribution of certain articles of property, to be determined by chance, amongst those who have

taken shares in the scheme, and the phrase has attained such a notoriety as to justify us in taking judicial notice of what is meant and understood by the use of it. The definition thus given of a gift enterprise is in substantial accord with that which has been attached to it by the provisions of section 171, *supra*, and is one which, it appears to us, may be safely adhered to.

The next objection urged to the information is, that it contained a charge of two separate and distinct offences, and that the weight of authority requires us to hold, notwithstanding some previous decisions of this court, that duplicity affords good cause for quashing an information. We regard this objection, also, as not well made. The information was not in all respects artistically framed, and contained some surplusage, but, taking all its averments together, we construe them to have charged that the appellants had advertised an account of when and where a certain gift enterprise was to be drawn, the prizes therein, the price of a ticket, and showing where tickets might be obtained, and had at the same time given publicity to said gift enterprise, by unlawfully circulating printed copies of such account. As thus construed, the information did not charge two separate and distinct offences, but only gave what purported to be a circuitous and somewhat detailed account of one transaction.

It is also objected that the account of the alleged gift enterprise, set out in the information, did not state the price at which tickets would be sold, or indicate either the time at which, or the place where, the proposed drawing for the articles to be donated would occur. The account thus set out announced how much money to be invested in a specified manner would procure a ticket, and that was certainly the equivalent of stating the price of the ticket. The announcement that the proposed donation would be held on the 10th day of December, 1882, was, in our estimation, when construed in connection with all the other parts of the alleged published account, in like manner, the equivalent of a statement that the

contemplated drawing would take place on that day, and in that respect it was sufficient to name either the time or place of the contemplated drawing, to bring the information within the provisions of section 172, *supra*.

It is still further objected that the information was defective in not averring that the appellants constituted the firm whose name was attached to the published account of the proposed drawing for the distribution of property, but we regard the omission of such an averment as wholly immaterial.

The *gravamen* of the offence charged in the information was the advertising of, and giving publicity to, a contemplated gift enterprise, and it was immaterial whether any, and, if any, whose name was signed to the published account of the scheme.

Our conclusion is that the motion to quash the information was correctly overruled.

The judgment is affirmed, with costs.

No. 8230.

Terre Haute and Indianapolis Railroad Company v. Jackson.

Railroad Company.—*Liability for Wilful Acts and Torts of Agents and Servants.—Corporation.—Principal and Agent.—Ratification.*—A corporation is liable for the wilful acts and torts of its agents, done to the injury of others, within the general scope of their employment, though the particular acts had not been previously authorized, and have not been ratified since, by the corporation.

Same.—*Contract with Passenger.—Breach.—Negligence.*—The contract of a railway company with its passenger is to carry safely; and if, through the negligence or wilful act of the conductor or of a brakeman, or of both, a jet of water is dashed upon the passenger while being carried, it is a breach of the contract.

Same.—*Evidence.—Previous Declaration of Servant.*—It being charged in the complaint that plaintiff, while being carried on the defendant's railroad,

was drenched with water, and that it was done wilfully, and evidence tending to show that it was done by the direct procurement of the brakeman, it was competent to prove a previous declaration by the brakeman of his purpose to do it.

SAME.—*Evidence of Injury.*—In an action against a railroad company for having wrongfully drenched the plaintiff, while a passenger, with water, it being specially charged that the injury caused a recurrence of dizziness and vertigo, it was competent, without offering medical testimony on the subject, to prove, among instances of such dizziness after the injury, the falling of the plaintiff upon a sidewalk.

JURY.—*Communication of Court With.—Coercion of Agreement by Threat.—Practice.*—It is error for the court, without the consent of a party, to send word to the jury, by the bailiff in charge, that if they do not agree to a verdict, he will keep them together until Saturday—that is to say, for four days. Such threat is an improper effort to coerce into an agreement.

From the Clay Circuit Court.

J. G. Williams, for appellant.

C. C. Matson and *H. H. Mathias*, for appellee.

WOODS, J.—The questions presented for decision in this case arise upon the overruling of the appellant's motion for a new trial.

The action was for injuries alleged to have been sustained by the appellee whilst a passenger upon a train of the appellant. The particular injury charged was the throwing of a jet of water from a water tank upon the appellee, it being alleged in one paragraph of the complaint that it was done wrongfully and purposely by the servants of the defendant in charge of the train, and in a second paragraph, that it was done carelessly and negligently.

After reviewing the evidence, counsel for the appellant says:

"All these circumstances seem to show conclusively that if there was any intention on the part of any one to wet Mr. Jackson, it was confined solely to Dougherty. He spoke of it before leaving Fillmore. He, alone, hinted anything about the half dollar, and he alone was instrumental in getting Jackson to go to the door of the caboose.

"The testimony, as a whole, justifies the conclusion that

Jackson was wet, whilst Rockwell was letting some water into the caboose from the tank, for the purpose of washing it out so as to render it suitable for him and the brakeman to sleep in that night at Indianapolis; and that, had not Jackson been standing in the door of the caboose, he would not have been wet. Under this state of facts, the verdict should have been for the defendant.

"Whilst it is true that a railroad company is liable for the wilful acts of its servants, done within the scope of their employment, and whilst in the discharge of their duty, it is not responsible for the wilful acts of its servants done when not acting within the scope of their employment.

"There is not a syllable of testimony showing that the conductor or brakemen of a freight train are required or authorized to wash out the cars of the company for their private accommodation."

Rockwell was the conductor, and Dougherty a brakeman in charge of the train.

The doctrine is now well settled, "that a corporation is liable for the wilful acts and torts of its agents committed within the general scope of their employment, as well as acts of negligence; and that the corporation is thus bound, although the particular acts were not previously authorized, nor subsequently ratified, by the corporation." *The Jeffersonville R. R. Co.* v. *Rogers*, 38 Ind. 116; *The American Express Company* v. *Patterson*, 73 Ind. 430, and cases cited. It is, therefore, immaterial whether the conductor or brakeman had been required or authorized to wash out the cars of the company for any purpose. The appellant had undertaken to carry the plaintiff, as a passenger, upon its train, and was bound to do it safely. For this purpose, the appellant was represented by its agents in charge of the train, and if they did anything inconsistent with the safe carriage and delivery of the plaintiff, at his destination, unharmed, the appellant, upon the plainest principles of law, as well as good policy, is liable for the injury. The drenching of a passenger with water, either neg-

ligently or wilfully, is a clear and direct breach of the duty to carry safely, and it is immaterial upon the question of the company's liability, whether it resulted from the fault of the brakeman alone, or of the conductor, or of both of them. They were each agents of the company for the running of the train, and the company, therefore, responsible for the acts of either, or both, in so far as such acts affected the passenger.

It follows that if the conductor was faultless in raising the valve and in throwing the water into the caboose, which could hardly be, when he knew there was a passenger there liable to be injured, and the brakeman designedly procured the plaintiff to go to the door of the caboose in order that the water might strike him, the company is clearly liable for the injury; that the evidence tends to show this state of facts, is not disputed.

It is next insisted that the jury awarded excessive damages. We can by no means say so.

The plaintiff, over the objection of the appellant, was permitted to prove by a competent witness a declaration of the brakeman, Dougherty, made to a fellow brakeman, on the train, but some distance from, and some hours before the arrival of the train at, the place where the injury was incurred, to the following effect: "I will tell you how we will get some tobacco. This old man with the hogs looks like a liberal old fellow, and we will tackle him for a half dollar for watering his hogs, and if he don't come down we will give him a wetting."

We are of the opinion that this declaration of the purpose of the brakeman to do the act complained of, made during the performance of the duty to carry the plaintiff, which the company had undertaken through Dougherty's agency to perform, was competent. It tended directly to prove the averment that the wrong was wilfully inflicted, as charged in one paragraph of the complaint; and there was other evidence tending to show that the brakeman communicated his pur-

pose to the conductor, and that the two acted in concert for the purpose of accomplishing the wrongful act.

After the act was done and past, the brakeman could not of course make a declaration which would be competent evidence against the company, but, under the issues, his purpose in doing the act was material, and it would seem that there could be no better evidence of that purpose, than his own declaration, made as in this instance the evidence in question shows it was made.

It is next insisted that the court erred in refusing to strike out the testimony of a witness, who testified that some months after the alleged injury the plaintiff fell in front of the witness's store and cut his head considerably.

The plaintiff testified that some years before the injury complained of, he had been subject to spells of dizziness or vertigo, of which, however, he had been for a long time free, and that after the injury there was a recurrence of this or similar trouble, and, as an instance of its effect upon him, detailed the fall testified to by the other witness.

The argument made against this testimony is, that it was not supplemented by medical or scientific evidence that the injury suffered might have produced the alleged consequence. It is plain, however, that this is no argument against the competency, however good against the force, of the evidence. Jurors have the right to draw inferences on such subjects from pertinent proofs in the light of common experience, unaided by doctors or other scientists.

The complaint specifically charged that the plaintiff did suffer, in consequence of the wrong done him, a nervous shock, and a recurrence of dizziness and vertigo; and, in support of this averment, it was competent to show the fall referred to by the witness. Whether proof of the injury received in the fall was admissible, is quite a different question, which we are not called on to decide.

Questions are made in reference to instructions given and refused, but, in the main, they are covered by what has been

said, and as the judgment must be reversed on other grounds, we will not examine them.

The record shows that after the jury had retired, and had been deliberating on their verdict for about nine hours, the court, without the knowledge or consent of the appellant, "caused the jury to be informed through the bailiff having them in charge, that if they did not agree upon a verdict the court would keep them there until Saturday night, a period of four days, to which action of the court the defendant, at the proper time, as soon as her attorneys learned of such action, objected and excepted."

This action of the court can not be justified. It constituted—as it must have been intended it should—a kind of coercion upon the jury, which was inconsistent with their proper independence.

Counsel for the appellee, conceding that the action of the court "may have been indiscreet," insist that it does not appear that it was prejudicial to the appellant, and that we must presume that it was harmless. But we can not so treat the matter. A plain error was committed. Its plain tendency was to influence the jury. The judge intended to influence them, else he would not have sent the message. It is not apparent how the appellant could show that any or what harm resulted. Under the circumstances, the presumption is that the jury was influenced, and, if any showing was possible or admissible, it should have come from the appellee.

The judgment is reversed with costs, and with instructions to grant a new trial.

No. 7996.

Baltimore, Ohio and Chicago Railroad Company *v.* Taylor et al.

Attachment.—*Garnishee.—Appearance.—Summons.—Continuance.—Practice.*—A motion by a garnishee to set aside the service of summons upon him

comes too late after the garnishee has submitted to a rule to answer and agreed to a continuance of the cause.

SAME.—*Record.—Supreme Court.*—Unless the motion by a garnishee to set aside the service of summons upon him is contained in a bill of exceptions, it is not properly in the record.

SAME.—*Pleading.—Reply.*—To an answer by a garnishee, that nearly four years after the service of summons upon him, the plaintiff had amended his affidavit of garnishment by striking out of the name of the principal defendant "Jonathan," and inserting instead the name "Johnson," and that before said amendment the garnishee had fully paid said "Johnson," without notice, etc., it was replied that the principal defendant was as well known, at the commencement of the suit, by the name "Jonathan" as "Johnson," which was well known by the garnishee before he paid said "Johnson."

Held, that the reply was good on demurrer.

SAME.—*Practice.—Bond.*—Objection by garnishee, after appearance of the principal defendant, to the attachment bond, can not be entertained. The bond is sufficient if signed by the surety only.

SAME.—*Amendment.*—The amendment of the original affidavit and undertaking in attachment, without objection by the principal defendant who appears, is not a matter to which a garnishee can make objection.

SAME.—*Non-Residence of Defendant.*—The non-residence of the principal defendant in attachment, as a ground for attachment, if not questioned by him, is not an issue as between the plaintiff and garnishee, upon denial by the latter of indebtedness to the principal defendant.

SAME.—The correction of a misnomer of the principal defendant in attachment, where he appears, does not vitiate the proceedings against the garnishee, nor lessen the protection which the proceedings would otherwise afford the latter against the former.

SAME.—*Judgment.—Costs.*—Where the garnishee is found to be indebted to the principal defendant in a sum sufficient to pay the plaintiffs and the costs, it is not error to adjudge costs against the garnishee.

From the Marshall Circuit Court.

J. H. Carpenter, J. W. Cook, M. A. O. Packard and *O. M. Packard*, for appellant.

M. H. Weir and *W. B. Biddle*, for appellees.

MORRIS, C.—On the 18th day of December, 1873, Thomas H. B. Teeples commenced a suit against Johnson Virtue, to recover $136.37 for work and labor. Teeples filed, with his complaint, an affidavit stating the nature of his cause of action, that it was just, the amount he ought to recover, and

that Virtue was not a resident of the State. Upon this affidavit he procured an attachment to be issued against the property of Virtue, filing an undertaking with surety for the due prosecution of the attachment proceedings. He also filed an affidavit that the appellant was indebted to Virtue, and procured a writ of garnishment to be issued in the cause against the appellant, which seems to have been served upon one Crocker, who was, at the time, the appellant's resident engineer. On the 18th day of March, 1874, James B. Taylor filed, in said court, his complaint against said Virtue, for work and labor, goods sold and boarding furnished the said Virtue, amounting to $411. He also filed, with his complaint, an affidavit and undertaking, for an attachment against the property of Virtue, and an affidavit as to the indebtedness of the appellant to said Virtue.

On the 29th day of April, 1874, William H. H. Dodd filed his complaint, in said court, against said Virtue, with an affidavit and undertaking, for an attachment against the property of said Virtue, and an affidavit alleging that the appellant was indebted to said Virtue.

On the same day William W. Whipple commenced a suit in said court, against the said Virtue, for money loaned and work and labor. He also filed affidavits and an undertaking as had the other parties commencing suits against said Virtue.

On the 25th day of January, 1876, Eli Taylor and Calvin J. Wright commenced a suit, in said court, against Virtue, for the balance of an amount amounting to $500.49. They also filed an undertaking and affidavits, for an attachment against the property of Virtue, and an affidavit for a writ of garnishment against the appellant.

The suits, subsequent to that of the original suit of Thomas H. B. Teeples against said Virtue, were commenced and prosecuted under and as part of said original suit in attachment.

It appears, from the record, that the defendant Virtue was served with process in all the cases. He appeared and answered to the original action by a general denial.

On May the 5th, 1874, the appellant, by its attorney, Mr. Cole, appeared, submitted to a rule to answer, and entered of record its agreement for a continuance of the cause.

It also appears that the several causes, as between the plaintiffs therein and the defendant Virtue, were submitted to the court for trial; that the court found in favor of the several plaintiffs, and against Virtue, but that no entry was made at the term at which the trial was had of the findings or judgment of the court. At a subsequent term of the court, upon the motion of the appellees, the court caused an entry to be made *nunc pro tunc* of its former findings and judgment.

The appellant moved the court to set aside the writ of garnishment; also, to strike from the docket the complaints of Dodd, Taylor and Wright, William W. Whipple and James B. Taylor against *Jonathan* Virtue.

These motions were overruled, and the appellant answered the several complaints, each in two paragraphs.

The plaintiffs severally replied to the second paragraph of the appellant's answer in three paragraphs. The appellant demurred to the third paragraph of the reply. The demurrer was overruled.

Various motions were made by the appellant to strike out the undertakings and affidavits filed by the several plaintiffs in the attachment proceedings, which motions were overruled. They will be noted hereafter.

Thomas H. B. Teeples, the original attachment plaintiff, dismissed his suit against Virtue.

The matters in issue between the parties were finally submitted to the court for trial, with the written request on the part of the appellant that the court find the facts specially and state the conclusions of law arising thereon.

During the trial, the attachment plaintiffs, upon leave of the court, amended their several complaints, affidavits and undertakings in said proceedings, by striking therefrom the name "Jonathan," the Christian name by which the defendant Virtue was designated in said paper, and inserting therein

the name "Johnson," as the Christian name of said Virtue, to conform said pleadings and papers in the cause to the evidence.

The facts and the law were found against the appellant. Exceptions to the conclusions of law were properly reserved.

The appellant then moved for a *venire de novo*. The motion was overruled, and it then moved the court to tax all costs in the cause to the appellees. This motion was also overruled, and the appellant appeals to this court and assigns errors as follows:

1st. The court erred in refusing to set aside the service of the summons in garnishment.

2d. The court erred in overruling the demurrer of the appellant to the 3d paragraph of the appellees' reply.

3d. The court erred in overruling the motion of the defendant to strike out the affidavit and undertaking in the case of the appellees Eli Taylor and Calvin Wright, and to quash the writ, for the reason that there was no sufficient affidavit, and the undertaking has no surety, and is not approved by the clerk of said court.

4th. The court erred in overruling the appellant's motion to strike out the paper marked "Undertaking," filed by the appellee Wm. H. H. Dodd.

5th. The court erred in overruling the appellant's motion to strike out the undertaking of the appellee William W. Whipple.

6th. The court erred in overruling the motion of the appellant to revoke the order of the court in consolidating the case of the appellee James B. Taylor, and that of Thomas H. B. Teeples.

7th. The court erred in permitting the said appellees to amend their respective affidavits and undertakings in attachment in their respective cases.

8th. The court erred in its special findings in the case.

9th. The court erred in its conclusions of law.

10th. The court erred in overruling the motion for a *venire de novo*.

11th. The court erred in overruling the appellant's motion to tax the costs to the appellees.

There is nothing in the first error assigned. The appellant had the unquestionable right, as garnishee, to object to the process and service by which it was attempted to bring it into court; but it might waive this right by a voluntary appearance to the proceedings. It appears that, in obedience to a writ of garnishment served upon one Crocker, the resident engineer of the appellant, it appeared to the action by its attorney, Mr. Cole, submitted to a rule to answer, and, by agreement entered of record, consented to a continuance of the cause. It was then too late to object to the process or its service. Such an objection must be taken *in limine*. *Gould* v. *Meyer*, 36 Ala. 565; Drake on Attachment, section 695 (4th ed.); *Whitney* v. *Lehmer*, 26 Ind. 503, 510.

Besides, the motion is not found in the bill of exceptions, and can not, for that reason, be regarded as a part of the record. *Kesler* v. *Myers*, 41 Ind. 543; *Kimball* v. *Loomis*, 62 Ind. 201. There was no error in refusing to set aside the service of the summons.

2. Did the court err in overruling the appellant's demurrer to the 3d paragraph of the reply to the 2d paragraph of its answer?

The answer states, that, since the commencement of the suit, the plaintiffs in attachment had amended the affidavit filed for a writ of garnishment against the appellant, by striking out the name of Jonathan Virtue and inserting the name of Johnson Virtue, which amendment was made on the 10th day of April, 1877; that appellant was not, at or before said amendment was made, indebted to said Jonathan Virtue nor to the said Johnson Virtue, and that, long before said amendment was made, the appellant had paid to Johnson Virtue all the money in its possession due him, without any notice of any suit or writ of attachment pending against him; that no writ of garnishment was ever served on it in a suit against

said Johnson Virtue; that it has not been indebted to said Johnson Virtue at any time since said amendment was made.

The reply admits that the affidavit had been amended as stated in the answer, but avers that said Virtue was at the time in the employment of the appellant as a contractor, and engaged in the construction of a part of its road in Marshall county, Indiana; that at the time of the commencement of the suit, said Virtue was known in said county and called by the name of "Jonathan" as well as "Johnson," and that the appellant, by its attorney and other agents, knew long before the payment of its indebtedness to Virtue, that the person now called Johnson Virtue was the person against whom said suit was pending, and that he was the person intended and referred to in said affidavit by the name of Jonathan.

The appellees insist that if the reply is bad the answer is also bad, and that there was, therefore, no error in overruling the demurrer. The answer does not deny directly that the appellant did not know that Johnson Virtue was called and known by the name of Jonathan Virtue, nor that Johnson Virtue was not the party sued and served with process. Conceding, however, that the answer is good, we think the reply must be held to be sufficient. Upon all the facts stated, the amendment was quite immaterial, and could not have misled or operated to the prejudice of the appellant. There was no error in overruling the demurrer.

3. It is insisted, by the appellant, that the court erred in overruling its motion to strike out the affidavit and undertaking filed in the attachment suit by Eli Taylor and Calvin Wright. No objection to the affidavit is pointed out by the appellant. We have examined it, and find no defect in it.

The objection to the undertaking is, that there is no surety, and that it was not approved by the clerk. The undertaking is signed by W. H. Weir, but not by the appellees Taylor and Wright. Weir was not a party to the suit, and by signing his name to the undertaking, which was in the usual form, undertaking to pay, etc., to Johnson Virtue, such damages as

he might sustain, etc., he became the surety of Taylor and Wright for the due prosecution of their proceedings in attachment.

As Virtue had appeared to the proceedings in attachment, and filed an answer, and thus given the court jurisdiction of his person, he waived, as it was competent for him to do, by not objecting, any defects in the undertaking. *The Ohio, etc., R. W. Co.* v. *Alvey*, 43 Ind. 180; Drake on Attachment, section 143. It was a matter that did not concern the appellant. There was no error in overruling this motion.

4. There was no error in overruling the appellant's motion to strike out the papers marked "undertaking," filed by the appellee Dodd.

5. Nor in overruling the motion to strike out the undertaking filed by the appellee Whipple. If these undertakings were defective, the attachment defendant, having appeared to the action, could alone take advantage of such defects. Being in court, the law regards him as competent to take care of his own rights and interests, and relieves the garnishee from all obligations in relation to such matters.

6. Counsel say nothing as to the 6th assignment of error. It will, therefore, be regarded as waived.

7. The counsel insist that the court erred in permitting the several appellees to amend their respective affidavits and undertakings, by striking therefrom the name "Jonathan," and substituting for it the name Johnson. If the Christian name of the attachment defendant was Johnson, and not Jonathan, we can not see how the appellant could be injured or affected by the change. The attachment defendant was in court, and, so far as appears, did not object to the amendment. It might be made, if there was no objection from him. If he consented even by not objecting, the appellant ought not to be heard to complain. It did not and could not affect it injuriously, for it had no interest in the undertaking. It was enough for its protection that the attachment defendant had submitted to the jurisdiction of the court. Such is the condition of the record

that it is doubtful whether any of the foregoing motions are properly presented. It is no fault, however, of the present counsel; they were not originally engaged in the case.

8. Counsel do not insist upon the eighth assignment.

9. The counsel for the appellant insist that the court erred in its conclusion of law.

The counsel insist, and correctly we think, that where an exception is taken to the conclusions of law stated by the court, in a case like this, the party excepting admits that the facts are correctly and fully found, but says that the court erred in the application of the law to the facts found.

It is insisted that the court, in finding that by law the plaintiffs below were entitled to judgment, erred, because it did not find that at the commencement of the attachment proceedings, Johnson Virtue was not a resident of the State. Was the residence of the attachment defendant a matter in issue between the appellant and the appellees? The case, as between Johnson Virtue and the appellees, had been tried. He had appeared to the action and filed an answer in denial of the complaint, which was an admission of the facts stated in the affidavits. True, he only answered to the original complaint, but that was an appearance in the action to all the complaints subsequently filed. The trial between the appellees and Virtue settled the question of residence, and it was no longer open to controversy. It was no part of the issue between the appellees and the appellant. Virtue, having appeared to the action and not having denied the facts stated in the affidavits for an attachment, admitted them for all the purposes of the suit. *Foster* v. *Dryfus*, 16 Ind. 158. The proceedings were not *ex parte*.

The affidavit alleging the appellant's indebtedness to the attachment defendant was the complaint which the appellant was called upon to answer. Its denial did not involve the question of the attachment defendant's residence. Had the defendant not been served with process, and had he not appeared to the action, the appellant might have raised the

question of his residence by denying the affidavit for the attachment, or perhaps without pleading at all.

The court found the facts substantially as follows:

That at the commencement of the suit, December, 1873, the appellant was engaged in building a road through the State of Indiana; that Johnson Virtue was a contractor in its employment, doing the grubbing and bridging on several sections of the road; that Virtue usually signed his name J. Virtue, and that he was the only person of the name of Virtue employed by the appellant as contractor in Indiana; that when Teeples commenced this action he enquired as to the Christian name of said Virtue, and was informed by persons likely to know his name that it was Jonathan Virtue, and sued him by that name; that the summons was issued and the docket entries made in the cause against said Virtue by the name of Jonathan; that the summons was served on Johnson Virtue, the defendant to the suit; that he appeared and answered to the action; that in the garnishee process the name of Virtue was written Jonathan Virtue.

It is further found that the appellant was indebted to said Virtue at the time the attachment proceedings were commenced, in the sum of $7,005.16, and remained so indebted until August, 1875.

The court also finds that, at the commencement of the suit, the said Johnson Virtue was indebted to the attachment plaintiff Teeples, in the sum of $136.

The court then proceeds to find that the issues between the several attachment plaintiffs and the said Johnson Virtue had been tried. The finding of the court was in favor of each of the plaintiffs, and had been made, as shown by the minutes on the judge's docket, as follows:

Wright & Taylor	$511.46
James B. Taylor	456.21
William H. H. Dodd	143.54
William W. Whipple	285.11

but that no entry of judgment has been made upon said finding; that Judge Long announced said findings in open court at the time and stated that the proper judgment would be entered thereon, but that, through inadvertence, no judgment had been entered. The court finds that the parties are entitled to judgment as of the date of said findings, January 26, 1876, and ordered the judgments to be entered as of that date, which was done; that appellant had, since the commencement of said suit, settled with and paid said Johnson Virtue in full.

Upon these facts, the court found, as its conclusions of the law, that the appellant was liable to pay the appellees the amount found due to each and the costs of the suits.

There is much irrelevant matter embraced in the findings of the court, but we think the facts found justify the conclusions of law reached by the court.

We do not think that the correction of the misnomer of the attachment defendant vitiated the proceedings; nor do we think that such correction would in any degree lessen the protection which the judgment in the proceedings would afford the appellant. Had it retained in its possession the amount due from it to Virtue, and paid it in discharge of the judgment rendered in the case against it, the judgment would have been a complete protection.

Where the attachment defendant is served with process or appears to the action, "though the attachment were illegally issued, yet it is the privilege of the defendant alone to take advantage of it, and if he waive the illegality, and the effects in the garnishee's hands are subjected to the payment of his debt, the defendant is concluded by the judgment of the court, and can not afterwards question its sufficiency to protect the garnishee." Drake on Attachment, section 692; *Washburn* v. *New York, etc., Co.*, 41 Vt. 50. "Where the defendant is personally before the court, the garnishee is not interested either in the jurisdiction or legality of the proceedings, or in their practical regularity *as against the defendant.*" Drake,

section 693. "When, however, the jurisdiction of the court over both the defendant and the garnishee has attached, the right of the latter to enquire into or interfere with the proceedings in the main action is at an end. * * They affect only the defendant, who alone can take advantage of them." Sec. 697. *Smith* v. *Chapman*, 6 Porter, 365; *St. Louis Perpetual Ins. Co.* v. *Cohen*, 9 Mo. 421; *Houston* v. *Walcott*, 1 Iowa, 86; *Ohio, etc., R. W. Co.* v. *Alvey*, *supra*.

A party who has once appeared to an action is deemed to be present in court until final judgment. *Jenks* v. *The State*, 39 Ind. 1. Therefore, until the final judgment was rendered in this case against Virtue—the day on which judgment was rendered against the appellant—Virtue, the defendant, must be considered to have been present in court. The court did not err in its conclusions of law.

10. There was no error in adjudging costs against the appellant. It had in its hands money due from it to Virtue, at the commencement of the proceedings in garnishment, more than enough to pay all the judgments in favor of the appellees and the costs of the proceedings. 2 R. S. 1876, p. 109, sec. 182. There was no error in overruling the motion for a *venire de novo*.

We think there is no error in the record of which the appellant can complain.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

No. 8863.

WILSON *v.* HEFFLIN.

SUPREME COURT.—*Assignment of Errors.—Dismissal.*—After submission of a cause in the Supreme Court, a motion to dismiss the appeal, for the reason that the names of some of the parties are omitted in the assignment of errors, will fail unless harm has resulted from the omission.

LIS PENDENS.—*Statute Construed.*—The act of 1877, concerning *lis pendens*, Acts 1877, Spec. Sess., p. 54, had no retroactive effect, and therefore did not apply to cases pending when it took effect, nor did it apply to cases in the courts of the United States.

SAME.—*Vendor and Purchaser.—Notice.*—Before such act a purchaser of real estate, while a suit was pending concerning it, was bound by the result of the suit, when, at the time of the purchase, the nature of the claim upon the property was disclosed by the pleadings.

From the Tipton Circuit Court.

F. M. Trissal, A. F. Shirts, G. Shirts and *W. R. Fertig*, for appellant.

J. Green, D. Waugh, J. C. Denny, C. S. Denny and *W. L. Granger*, for appellee.

BICKNELL, C. C.—This was an action to quiet the title to real estate, brought by the appellant against the appellee and several others. There was a cross-complaint by the appellee, in which she prayed that the land in controversy should be declared subject to the lien of a judgment held by her.

The issues were tried by the court, who, at the request of the appellant, made a special finding of the facts, and stated the conclusions of law separately, as follows:

"On the 20th day of January, 1873, the defendant, Martha A. Hefflin, was the owner of the real estate described in the plaintiff's complaint; she inherited it from her father, and was not, and had not been, the owner of any other real estate in Tipton county; said land was set off to her in the name of Martha A. Wright, in a partition suit among her father's heirs, after which partition she married Reuben T. Hefflin; on the same day that she sold said lands to said Busenbark, she and her husband executed to him a warranty deed therefor, and put him in the quiet and peaceable possession thereof, taking a mortgage to secure the payment of the purchase-money, which was evidenced by two notes, one for $1,000, due in two years, and one for $839, due in four years; by the mutual mistake and inadvertence of all the parties to said mortgage and deed, the land intended to have been described therein was errone-

ously described in said deed and mortgage, as 60 acres off of the north end of the west half of the northeast quarter of section 20, town 21, range 6 east, instead of the proper description thereof, to wit: 60 acres off of the north end of the west half of the southeast quarter of section 20, town 21, range 6 east, in Tipton county, Indiana, as alleged in her answer and cross-complaint; that said deed and mortgage were recorded on the 15th day of March, 1873, in the recorder's office of Tipton county, Indiana."

The court further finds:

"That on the 20th day of August, 1875, Mrs. Hefflin commenced an action in the Tipton Circuit Court, to foreclose said mortgage, and to obtain judgment upon her said notes secured thereby, against John Busenbark and Lucinda, his wife, and the Victor Sewing Machine Company, defendants, all of whom were duly notified of the bringing of said action, by summons for the next ensuing term of said Tipton Circuit Court.

"That said sewing machine company appeared to said action by her attorneys, and claimed an interest in the notes secured by the mortgage, and upon her appearance and application, caused the transfer of said cause, as to the issue and questions between said company and defendant Hefflin, to the circuit court of the United States for the District of Indiana; but, as to the issue and question between said defendant Hefflin and Busenbark, the cause was continued in the Tipton Circuit Court.

"That said cause remained pending and undetermined in said Tipton Circuit Court, as to said defendant and Busenbark; that John Busenbark appeared thereto, and filed his answer to the complaint on the 9th day of September, 1875.

"That in the complaint, as originally filed in said Tipton Circuit Court, for foreclosure of said mortgage as aforesaid, there was no allegation of a mistake, or prayer for the reformation thereof, but on the 12th day of January, 1877, when said mistake was first discovered by said Hefflin, said

complaint was for the first time amended, so as to allege a mistake in the execution of said mortgage as before stated, and to ask a reformation of said mortgage, and a foreclosure thereof as corrected.

"That on the same day that said amendment to her said complaint was made, said Hefflin (her husband then being dead) executed another deed for the land described in the complaint, to said John Busenbark, which deed was in the usual form of warranty deeds, recited a consideration of $2,000, and contained no reference to its being made for the purpose of correcting the deed made to said John Busenbark when the land was first conveyed to him, but said deed was in fact made for no other consideration or purpose than for the correction of the mistake in the description of the land in the first deed to said Busenbark. After the transfer of said cause to the Circuit Court of the United States, as aforesaid, said cause in said Tipton Circuit Court was regularly continued until the November term, 1878, of said circuit court, when Mrs. Hefflin recovered judgment for $1,900 on her said notes, against said John Busenbark, and a finding of the court that a mistake occurred in the execution of said mortgage as hereinbefore and in her amended complaint stated, and a judgment and order of the court correcting such mistake, so as to describe the land in said mortgage as herein last described, being the correct description, and intended to be so described in the mortgage, and a foreclosure of said mortgage as corrected, against said Busenbark and wife, and a decree and order of sale of the same, described as aforesaid.

"That the said Victor Sewing Machine Company, of Middletown, Connecticut, filed her bill in chancery in the Circuit Court of the United States, for the District of Indiana, against John Busenbark and Lucinda, his wife, and this defendant, on the 15th day of November, 1876, claiming to be the owner of the notes and mortgage aforesaid, alleging the mistake in the execution of said mortgage, as hereinbefore stated, and asking a reformation of such mistake and foreclosure of said

mortgage as set forth in her third paragraph of answer and second paragraph of cross-complaint; that said Martha Hefflin, without any process served upon her, voluntarily appeared in said court on the 8th day of January, 1877, and filed her petition to be made a party to said suit, and was admitted as such, and on the 12th day of March, 1877, she appeared to said action and filed her answer and cross-bill, claiming ownership of said notes and mortgage as set forth and described in the plaintiff's bill of complaint, and asking for a foreclosure of said mortgage in her favor, and for all equitable relief that she was entitled to, but did not allege in her said cross-bill that there had been any mistake in describing said land, nor did she ask any reformation of said mortgage in her cross-bill; afterwards, on the 12th day of March, 1877, said John Busenbark and Lucinda, his wife, appeared to said action in said U. S. Circuit Court, and filed their answer to the complaints. Afterwards, to wit, on the 29th day of June, 1877, such proceedings were had in said cause in said Circuit Court of the United States, that said Martha A. Hefflin was found, by the judgment and decree thereof, to be the owner of said notes and mortgage, and that a mistake had occurred in the description of said land in said mortgage as aforesaid, and a reformation thereof was then and there ordered and decreed by the court, describing said land in said mortgage as last afore described, being the correct description, and the one intended by the parties to said mortgage, as well as judgment of foreclosure in favor of said Martha A. Hefflin for the sum of $2,896.

"The court further finds that the plaintiff, Robert L. Wilson, purchased the lands described in the complaint, on the 31st day of December, 1877, paid a valuable consideration therefor and had no actual notice of the mistake in said mortgage, or that said deed to said John Busenbark, of the 12th of January, 1877, was intended only to correct a former deed, and that he had no actual notice of the pendency of either or any of the suits hereinbefore mentioned. That the plaintiff

has possession of said real estate and obtained such possession from his immediate vendor at the date of his purchase.

"The court further finds that the plaintiff purchased said land from Haymond W. Clark, who purchased the same and took a quitclaim deed of conveyance from said John C. New, on the 8th day of November, 1877; that the consideration expressed therein was one dollar; that said New acquired title by warranty deed from John Busenbark, dated August 14th, 1877, the same being deeded to him by said Busenbark in payment of a mortgage executed by said Busenbark to T. B. Smith and endorsed to him; that said judgments in said United States Court and Tipton Circuit Court are unpaid, unreversed and not appealed from; that said Victor Sewing Machine Company, at the time of the commencement and pendency of her said suit in the United States Court, was a non-resident of the State of Indiana; that all of the defendants to her bill of complaint therein, and all of the grantees of said land under said John Busenbark, were residents of the State of Indiana; that all of the grantees, in the several deeds to said land, subsequent to said Busenbark, purchased and took such deeds while said suit of said Sewing Machine Company and this defendant's answer and cross bill thereto were pending in the United States Court, and while this defendant's action aforesaid was pending in the Tipton Circuit Court to correct the mistake in said mortgage and for a foreclosure thereof.

"The conclusion of law by the court, upon the foregoing facts, is that the defendant Martha A. Hefflin is entitled to enforce her judgment against the land in controversy as against the plaintiff's deed thereto, or his interest in said land, and judgment is rendered in favor of defendant Martha A. Hefflin as against the claims of the plaintiff herein to the extent of her judgment lien upon said land."

The plaintiff excepted to said conclusions of law. Judgment was rendered for the defendant for costs, and the plaintiff appealed.

The errors are assigned as follows:

"1st. The court erred in the conclusions of law upon the special finding of facts made at the request of appellant.

"2d. The court erred in its conclusions of law upon the special finding of facts, in this, that the conclusion of the court, being that the appellee is entitled to a lien upon the real estate described in the complaint, as against the appellant, should have been that the appellant is entitled to hold said real estate free and discharged from any claim or lien of the appellee."

The appellee moves to dismiss the appeal, because all the parties defendants in the suit are not named in the assignment of error; this motion was made on March 25th, 1882; this cause was submitted by agreement on December 20th, 1880. After such a submission, a motion to dismiss the appeal for such a cause can not be sustained. *Truman* v. *Scott*, 72 Ind. 258. In *Hadley* v. *Hill*, 73 Ind. 442, it was held that such a motion is purely technical, and ought to be overruled, unless the omission has done some harm. The motion to dismiss the appeal is overruled.

It is well settled in Indiana, that where there is a sale of real estate pending a litigation concerning it, it is not necessary to make the vendee a party, because he is bound by the result of such litigation, although not a party to it. *Kern* v. *Hazlerigg*, 11 Ind. 443. In *Green* v. *White*, 7 Blackf. 242, this court said: "A *lis pendens*, duly prosecuted, is notice to a purchaser, so as to affect and bind his interest by the decree." In *Worsley* v. *The Earl of Scarborough*, 3 Atk. 392, it was said, all people are supposed to be attentive to what passes in a court of justice, and it is to prevent a greater mischief that would arise by people buying a right under litigation that this principle has been established.

In *Murray* v. *Lylburn*, 2 Johns. Ch. 441, it was held, that a purchase of a right under litigation is a fraud upon the plaintiff, and is so far considered a nullity that it can not avail against his title.

In *Britz* v. *Johnson*, 65 Ind. 561, this court said: "The character of *lis pendens* which may affect the title of a purchaser is well defined. There must be a suit pending, and the complaint in the suit must disclose the subject-matter of it." In *Leitch* v. *Wells*, 48 N. Y. 585, it is said: "The commencement of an action by the service of a summons does not create a *lis pendens* affecting third persons not parties to the action; to bind a purchaser *pendente lite* by the judgment, there must be a bill or complaint on file at the time of his purchase, in which the claim upon the property is set forth."

It appears by the special finding, that Mrs. Hefflin's complaint, in the foreclosure suit in the Tipton Circuit Court, made no mention of the mistakes, and did not give the true description of the property, but was afterwards amended so as to state the mistakes and the true description, and to demand the correction of the mortgage, and its foreclosure as corrected.

After this amendment there was a complaint on file, in which Mrs. Hefflin's claim was set forth, and then there was enough to bind a purchaser, under the authority of *Britz* v. *Johnson*, *supra*.

This amendment was made on January 12th, 1877; Busenbark conveyed to New on August 14th, 1877; New quitclaimed to Haymond on November 8th, 1877, and Haymond conveyed to the appellant on December 31st, 1877.

Upon the face of the foregoing proceedings, it would seem that the appellant was bound by the decree of the Tipton Circuit Court made at the November term, 1878.

But the suit of Mrs. Hefflin was commenced in August, 1875, against Busenbark and wife and the Victor Sewing Machine Company, and said company removed its branch of the case to the United States Circuit Court, leaving the issues between Mrs. Hefflin and Busenbark and wife still pending in the Tipton Circuit Court.

It appears, also, that said company filed an original bill in

chancery on November 15th, 1876, in said circuit court of the United States, against Busenbark and wife and others, in which bill said company claimed to be the owner of said notes and mortgage, and set forth the mistake aforesaid in the execution of the mortgage, and demanded a correction of the mistake and foreclosure of the mortgage as corrected; that the appellee, on her petition, was admitted to defend in said suit on January 8th, 1877, and on March 12th, 1877, filed her answer and cross-complaint therein, claiming ownership of said notes and mortgage, and demanding all equitable relief, and on the 29th of June, 1877, obtained a decree in said suit, that she was the owner of said notes and mortgage, and that said mistake in said mortgage should be corrected, and the mortgage foreclosed as corrected, in favor of the appellee for $2,896.

Here was a suit in the circuit court of the United States affecting the property, in which the appellee's claim of ownership of the notes and mortgage, and prayer for all equitable relief, was filed on March 12th, 1877, the mistake in the mortgage and the prayer for its correction and foreclosure having been already asserted in the bill in that suit; and in said suit the appellee obtained her decree before the date of the deed to appellant, and before the date of any of the deeds, except the deed made by appellee to Busenbark in correction of the mistake in her first deed. Here was a sufficient *lis pendens* in the circuit court of the United States to bind the appellant.

The counsel for the appellant claim that the rule as to *lis pendens* has been modified by the case of *Etzler* v. *Evans*, 61 Ind. 56, but that case decides only, that an instrument recorded, but not authorized by law to be recorded, is not notice to anybody, and that a mortgage, duly satisfied of record, ceases to be notice to anybody of the existence of the mortgage.

The appellant also claims that the purchaser in this case was protected by the act of March 14th, 1877, Acts 1877, Spec. Sess., p. 54, entitled "An act to provide [for] giving notice of

pending suits, attachments, levies and liens affecting real estate in certain cases," and that it was the duty of the appellee to have filed with the clerk the written notice required by the second section of that act.

That act has no effect upon suits in the United States courts, and has no retroactive operation. Both of the suits were commenced before that act took effect; new statutes apply only to future cases, unless there is something in the nature of the case, or in the language of the statute, which shows it was intended to be retroactive. Potter's Dwarris Statutes, 163, note.

The appellant also claims that, under the act of Congress of March 3d, 1875, sec. 3, Supplement to R. S. U. S., vol. 1, p. 173, it was the duty of the Tipton Circuit Court, after a proper petition for removal and bond filed, to proceed no further; whereas the court proceeded under the repealed act of Congress of March 2, 1867, 2 R. S. U. S., section 639, and transferred one branch only of the case and retained jurisdiction as between the appellee and the other defendants, according to the former practice under said repealed act. If the proceedings in the Tipton Circuit Court can not be attacked collaterally (see *Walker* v. *Heller*, 73 Ind. 46-52; *Evans* v. *Ashby*, 22 Ind. 15), then the appellant, having purchased pending the suit, was bound by the decree, although not a party to the suit; but, even if the action of the Tipton Circuit Court, subsequent to the removal proceedings, could be regarded as without jurisdiction and utterly void, there would still remain the *lis pendens* in the United States Circuit Court, and the appellant, having purchased pending that litigation, was bound by the decree therein.

In reference to this litigation, the appellant claims that because the appellee, in her cross-complaint therein, did not expressly ask to be substituted to the rights claimed by the Sewing Machine Company, and did not allege any mistake, therefore the decree of the U. S. Circuit Court, giving the appellee what she did not ask, was *coram non judice*, and of no validity against a purchaser without notice; but the mis-

take had already been alleged and correction of it demanded in the bill. The appellee, in her cross-complaint, stated her ownership of the notes and mortgage, and prayed for all equitable relief. It was therefore clearly within the jurisdiction of the court to render the decree in favor of the appellee. The substance of the appellee's claim upon the property fully appeared on the face of the proceedings, before the defendant purchased, and before any of the deeds were made, except the appellee's deed to Busenbark, correcting the mistake in the first deed. The appellant was therefore bound by the decree.

The counsel for the appellant also claim that, because Mrs. Hefflin made an absolute deed to Busenbark, not stating therein its purpose as correcting the mistake in the former deed, she is estopped thereby from claiming anything against the appellant, who is a purchaser under Busenbark without actual notice, and that therefore the rule of law, that a purchaser of real estate is chargeable with notice of a pending litigation affecting the title, does not apply to this case. He cites the case of *King* v. *Rea*, 56 Ind. 1, where it is said: "When a person, competent to act, has solemnly made a deed, he shall not be allowed to gainsay it to the injury of those whom he has misled thereby."

Here, however, was notice by a *lis pendens*. Such a notice is equivalent to actual notice; it makes the case as strong in favor of the appellee as it would have been had the second deed to Busenbark contained a full statement that it was made for no other purpose than to correct the mistake in the first deed.

There was no error in the conclusions of law. The judgment of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellant.

No. 8684.

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YEAGER v. TIPPECANOE TOWNSHIP.

TOWNSHIP.—*Repair of Highways.—Negligence.—Damages.*—In 1879, a civil township had no such powers conferred or duties imposed upon it as required it to keep in repair the public highways; and hence it was not liable for damages accruing from neglect to do so.

From the Kosciusko Circuit Court.

C. Clemans and *A. C. Clemans*, for appellant.

J. H. Carpenter and *J. W. Cook*, for appellee.

FRANKLIN, C.—This was an action brought by appellant against appellee, to recover damages for injuries alleged to have been caused by appellee negligently permitting a public highway in the township to be out of repair. The complaint is somewhat lengthy, and substantially states, that there was located in said township a public highway; that on the 23d of September, 1879, the rain had washed out a gutter in said highway two feet deep, twenty inches wide, and twenty feet long; and upon that day, after the gutter had been so washed out, appellant, with one Andrew Yeager, were driving along said road with a two-horse buggy, appellant carrying a loaded gun in his hands; that they drove the horses and buggy into said gutter, there being no way of driving around it; that without negligence, and with careful driving into the gutter, the buggy was so jarred and jostled as to break the tongue and one of its wheels, and appellant was violently thrown out upon the ground, and the gun was so violently thrown against the ground as to cause it to discharge its load into the arm of appellant, and break and crush the bone thereof, which had disabled him for life, to his damage two thousand dollars.

To which complaint a demurrer was sustained.

The ruling on the demurrer is the only error assigned in this court.

The question of the liability of a township for such injuries, we believe, has never heretofore been before this court.

The doctrine of the liability of cities for such injuries appears to be well settled. *Grove* v. *The City of Fort Wayne*, 45 Ind. 429; *Higert* v. *City of Greencastle*, 43 Ind. 574.

In the absence of a statute making cities liable, this doctrine or rule of decision appears to be based upon the fact that the act for the incorporation of cities provides that "the common council shall have exclusive power over the streets, highways, alleys and bridges within the city," and invests them with ample power of taxation for general purposes, under which must be included street improvement purposes, and if they fail to exercise these powers, they should respond in damages to any one injured by their neglect to keep the streets in repair.

It has also been held by this court, that counties are liable for injuries arising from negligently permitting the bridges of the county to be and remain out of repair. This ruling has also been based upon the fact "that the board of commissioners has ample power to build and repair bridges, and to make appropriations from the county treasury for that purpose, and that it may determine the amount of taxes to be levied for county expenditures, which includes expenditures for the building or repair of bridges where the same are built or repaired by the county; and that it is made the imperative duty of the board to cause all bridges in the county to be kept in repair." *House* v. *The Board of Commissioners of Montgomery County*, 60 Ind. 580.

The enquiry thus arises as to what effect these rules of decision should have upon the question under consideration.

Appellee, in its brief, has referred us to a number of cases in which it has been held by some of the courts in the Eastern States, that the towns (which are to some extent similar to our townships) are not liable for such injuries, unless expressly made so by statute, wherein a distinction is drawn between corporations brought into existence by the action of the inhabitants, and those created by the sovereign authority, for

the public good. But this court has based its rulings upon a different principle, to wit, the obligation to discharge a duty.

Hence, we are led to investigate the powers and duties of a township in this State over the highways therein situated.

Section 8 of the act upon Township Business, 1 R. S. 1876, p. 901, provides that "The trustee shall superintend all the pecuniary concerns of the township, and shall, at the June session of the county board, annually, with the advice and concurrence of the board of county commissioners, levy a tax on the property of such township, for township, road, and other purposes, and report the same to the county auditor. * * But in case of failure of such trustee and commissioners to concur, then the board of county commissioners shall determine upon and levy such township, road, and other taxes."

Section 11 of the same act provides, that "The township trustee shall, annually, on the last Saturday in February, settle with and audit the accounts of supervisors of roads in his township, and shall within five days thereafter, make to the board of county commissioners, a complete report of the receipts and expenditures of his township during the preceding year," etc.

The third, fourth and fifth clauses of the 6th section, require the township trustee "To divide his township into convenient highway districts and make such alterations in the same as may be necessary." "To fill all vacancies that occur in the office of supervisor of highways in his township." "To see to a proper application of all moneys belonging to the township for road, school or other purposes, and perform all the duties heretofore required of the township trustees, clerk and treasurer, under the supervisors and school acts."

Section 19 provides, that "The township trustee shall in no case, have any power to change, vacate, or open any highway, in any township, in any county; but such power shall be vested in the county commissioners of the county," etc.

The foregoing embrace all the powers and duties of a township trustee in relation to the public highways, and in

none of them is there any power given or duty enjoined over the working or repairing of the highways.

There are other provisions of our statutes requiring the supervisors of roads to work and keep the highways in repair.

According to the provisions of the act of March 5th, 1877, which were in force at the time of the alleged injury complained of, the supervisor should cause the road working to be done in the months of April, May and June. And the 29th section (see Acts 1877, Reg. Sess., p. 135) provides, that "All moneys in the treasury of any county, belonging to a road district thereof, shall be paid over to the trustee of the township in which such district is situated, on the warrant of the proper auditor, and shall be applied to the benefit of such district; the money so paid to the township trustee shall be by him paid out on the order of the supervisor or supervisors of such township; all moneys and labor, intended for the improvement of roads, shall be expended thereon on or before the fifteenth day of September in each year."

The 17th section thereof provides, that, "When a public highway, running through or bordering on a plantation, shall become obstructed, the owner or occupant of such plantation shall remove such obstruction as soon as the same shall come to his knowledge, for which the proper supervisor shall allow him a reasonable credit on his liability to work on the highways," etc.

This obstruction occurred after the 15th of September, to wit, on the 23d, when the only person legally required to remove it was the owner or owners of the adjacent land; and as the complaint shows that the road at the point of the obstruction was fenced in on both sides, that the land on the north side was owned by Jeremiah Myers, and on the south side by John W. V. Humble, he should have notified one or both of them to remove the obstruction.

We have thus fully referred to these statutes for the purpose of showing, under our complex system, the mixed pow-

ers and duties over the public highways, and that there is no exclusive jurisdiction over the whole subject, lodged in any one agent, officer or corporation. The board of commissioners has the jurisdiction over their establishment, change and vacation, and over the levy and collection of the road tax, the township trustee only having the privilege of concurring in the levy. The supervisor has the jurisdiction over the working and repair of the highways, and he is limited in time, and partially superseded by the intervention of the adjacent land-owner.

The case of *Perry* v. *Barnett*, 65 Ind. 522, was an action against the road supervisor for an injury from an alleged negligent construction of a small bridge in a public highway. This court held that the evidence did not support the cause of action. And as to whether the defendant was liable depended upon the powers conferred and the duties imposed upon him, and the means at his command to perform the duties imposed; thus tacitly recognizing the possibility of another liability for the repair of highways, than that of the township.

We think a township has no such powers conferred or duties imposed, as require it to keep in repair the public highways. It does not occupy such a. relation to them, that cities do to streets or alleys, or that counties do to bridges.

We therefore hold that the township can not be made liable for the injury complained of, and that there was no error in sustaining the demurrer to the complaint.

The judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be and it is in all things affirmed, with costs.

No. 9745.

THE STATE v. WINNINGER.

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CRIMINAL LAW.—*Constable.—Taking Recognizance.—Statute Construed.*—Fixing the amount of a recognizance in cases of felony, is a judicial act which a constable has no authority to perform; nor does section 1705, R. S. 1881, confer upon him authority to take recognizances in such cases without a judicial order fixing the amount, or directing that bail may be taken; and a bond so taken, without such order, is void, and subsequent acts of the court can not validate it, nor is it such a defect as is cured by section 1221.

RECOGNIZANCE BOND.—*Complaint.*—A complaint upon a forfeited recognizance must state facts showing that the officer, by whom bail was accepted, had authority to take it.

SAME.—*When Void.—Jurisdiction.*—A recognizance taken by a court without jurisdiction, or by an officer without authority, is void.

SAME.—*Justice of the Peace.—Amount of Bond.*—A justice of the peace can not fix the bail in cases of felony at the time of issuing the warrant.

From the Jackson Circuit Court.

D. P. Baldwin, Attorney General, *F. L. Prow*, Prosecuting Attorney, *D. A. Kochenour* and *M. H. Owen*, for the State.

R. Applewhite, for appellee.

ELLIOTT, C. J.—The material allegations of the appellant's complaint are these: Three persons were charged in an affidavit, filed before a justice of the peace, with the commission of a felony; a warrant for their arrest was issued and placed in the hands of a constable, who arrested the accused persons; they were brought to the office of the justice, but he was not present; upon their request, the constable fixed a time for their appearance and the amount of their bail; he accepted their recognizance, with the appellee as surety, for their appearance at the time appointed; the accused persons failed to appear at the time specified, and the State brought this action upon the recognizance taken by the constable. A demurrer was sustained to the complaint.

This ruling was right. Fixing the amount of a recogni-

zance in cases of felony, is a judicial act, which a constable has no authority to perform. The provision in the statute, that "Any officer authorized to execute a warrant in a criminal action may take the recognizance and approve the bail," does not confer upon a constable authority to take a recognizance in cases where there is no judicial order fixing the amount or directing that bail may be taken. The cases of *Hooker* v. *State, ex rel.*, 7 Blackf. 272, and *Larr* v. *State, ex rel.*, 45 Ind. 364, cited by the appellant, do not touch the question here involved, and the cases of *Trimble* v. *State*, 3 Ind. 151, and *Votaw* v. *The State*, 12 Ind. 497, decide that the amount fixed by the court need not necessarily be endorsed on the warrant. The decision in *McClure* v. *State*, 29 Ind. 359, declares that where the recognizance is taken in open court, it is not necessary that there should be an order fixing the amount. It is plain that these cases do not lend the appellant any support.

It is settled that a complaint upon a forfeited recognizance must state facts, showing that the officer, by whom bail was accepted, had authority to take it. *Myers* v. *State*, 19 Ind. 127; *Blackman* v. *State*, 12 Ind. 556; *Hawkins* v. *State, ex rel.*, 24 Ind. 288. A constable can not take bail in cases of felony, unless an order of court has fixed the amount, and where, as here, there is no such order shown, the complaint fails to show authority in the officer by whom it was taken.

The statute referred to by appellant only authorizes an officer to take bail in the proper cases; it does not confer authority upon him to take recognizances in all. The evident meaning of the statute is that any officer having power to serve a warrant in a criminal prosecution shall have authority to accept bail, where bail has been ordered by competent authority. It does not, however, invest a ministerial officer with authority to determine when a case is bailable and when not, or, if bailable, what the amount of bail shall be. If it were otherwise, constables might take upon themselves to decide in felonies of the highest grade what the amount of the bail should be, and this, surely, never was intended by the

Legislature. In *Votaw* v. *The State, supra,* it is very plainly intimated that a sheriff has no power to fix bail in cases of felony. It was there said by WORDEN, J., that, "If the answer in question is good, it is because it is to be inferred from what is therein stated, that the amount of bail had not been properly fixed by competent authority. The replication meets that inference, and shows that the amount of bail had been fixed by the order of the court, and we think it is a proper reply, and good if the answer be good. If it can not be inferred from the facts set up in the answer, that the amount of bail had not been fixed by competent authority, then the facts set up are wholly immaterial." In *Boaz* v. *Tate,* 43 Ind. 60, it was said, in speaking of the section of the statute under immediate mention: "The first provides, that any officer authorized to execute a warrant in a criminal action may take the recognizance and approve the bail. That does not authorize him to fix the amount of the bail."

There is no force in the argument that the subsequent act of the justice validated the bond. A recognizance must be valid at the time it is entered into; subsequent acts of the court or officer will not give it validity. *Griffin* v. *State,* 48 Ind. 258; *Hannum* v. *The State,* 38 Ind. 32. A judicial act can not be performed by a deputy or agent. The justice could not have expressly authorized the constable to admit to bail and fix the amount of the recognizance. What he could not directly do he can not do by implication.

The statute providing that no recognizance taken by any officer "in the discharge of the duties of his office, shall be void for want of form or substance," does not apply to such a case as the present. There is no question here as to the form or substance of the instrument; the question is as to the authority of the officer to take any recognizance at all. It is well settled that a bond or recognizance taken by a court without jurisdiction, or an officer without authority, is utterly void. *Olds* v. *State,* 6 Blackf. 91; *Sherry* v. *Foreman,* 6 Blackf. 56; *Byers* v. *The State, ex rel.,* 20 Ind. 47; *Gaspar* v.

The State, 11 Ind. 548; *Gachenheimer* v. *The State*, 28 Ind. 91; *State* v. *Gachenheimer*, 30 Ind. 63.

We are not to be understood as intimating that a justice may fix bail in cases of felony at the time of issuing a warrant. On the contrary, we are inclined to the opinion that this right exists only in cases where the justice has granted a continuance, or recognized an accused to appear in the circuit court to answer the charge preferred against him. *Hawkins* v. *State, ex rel.*, 24 Ind. 288; 2 R. S. 1876, p. 670.

Judgment affirmed.

No. 7820.

TACHAU ET AL. *v.* FIEDELDEY ET AL.

REVIEW OF JUDGMENT.—*Default.*—*Waiver of Objection.*—*Practice.*—A complaint to review a judgment for error appearing by the record thereof is, in effect, the same as an appeal to the Supreme Court, and no error, not available upon appeal, can be reached thereby. If a judgment be taken by default without exception, and upon due notice to the party, he must first apply, in the cause, for relief from error, else his assent thereto will be inferred, and he can raise no question by review.

SAME.—*Complaint.*—Less than the whole complaint can not be attacked for insufficiency for the first time by complaint to review.

From the Marion Superior Court.

H. Dailey and *W. N. Pickerill*, for appellants.

T. E. Johnson, for appellees.

MORRIS, C.—This action was brought by the appellants to review a judgment rendered in the superior court of Marion county, on the 3d day of July, 1876, in favor of the appellee John O. Fiedeldey, against appellants and others, for errors apparent upon the face of the proceedings sought to be reviewed.

It appears from the complaint that the appellant, on the 2d

day of May, 1874, obtained a judgment against Morgan B. Shaw and Frank S. Newby, in the superior court of Marion county, for the sum of $732, and that execution was issued thereon, returned *nulla bona*.

On the 2d day of June, 1874, they, the appellants, commenced an action in said superior court, against Morgan B. Shaw, Frank S. Newby, Victoria Shaw, William A. McCormick and Anderson Brewer, to set aside as fraudulent certain conveyances of real estate, alleged to have been bought by Morgan B. Shaw and Frank S. Newby, as partners, with their firm assets, of William A. McCormick, and which they caused McCormick to deed to Victoria, the wife of Morgan B. Shaw, to prevent the same from being reached by the creditors of said Shaw and Newby, and especially for the debts of Tachau and Wehle, and that afterwards Morgan B. Shaw and wife conveyed it to Anderson Brewer without consideration, in furtherance of the same fraudulent purpose.

Newby, the partner of Shaw, in his answer, admitted the truth of the complaint; and, on the 11th day of January, 1875, the court rendered judgment, finding said conveyances fraudulent, that the real estate was the real estate of M. B. Shaw & Co., and directing the sheriff to sell it, and out of the proceeds to satisfy Tachau and Wehle's debt, and to bring any excess into court to await its order. On the 3d day of April, 1875, the real estate was sold under this judgment, and bid in by Tachau and Wehle for their debt and costs, and a certificate of purchase issued to them.

On the 2d day of June, 1874, the appellee John O. Fiedeldey obtained judgment for the sum of $658.26 against Morgan B. Shaw and Frank S. Newby as a firm, in the superior court of Marion county, and execution having been returned *nulla bona*, on the 5th of December, 1874, Fiedeldey commenced an action in the superior court of Marion county, against Morgan B. Shaw, Frank S. Newby, Victoria Shaw, William A. McCormick and Anderson Brewer, to set aside as fraudulent the same conveyances that appellants Tachau and Wehle had

commenced their action to set aside as fraudulent in June of the same year. Fiedeldey's complaint was in two paragraphs.

On the 3d day of June, 1875, after appellants had obtained their judgment setting aside said conveyances as fraudulent, and after they had had a sale thereunder and received their certificates of purchase, Fiedeldey filed a third paragraph of complaint, in which he recited the facts recited in the first and second paragraphs, and, having made appellants parties to his action, in this third paragraph he also sets up that appellants had obtained a judgment setting aside the same conveyances he was seeking to set aside and had a sale thereunder, and received a certificate of purchase for the real estate in controversy; and in addition to asking that the conveyances attacked in the first and second paragraphs might be set aside, he also asked that appellants' sheriff's sale of the land might be set aside for irregularities specified in this third paragraph, and that the sheriff be enjoined from delivering a deed on the certificate of purchase which he had given to appellants. In that action these appellants were served by publication and defaulted.

On the 3d day of July, 1876, more than a year after appellants had obtained their judgment setting aside the conveyances of Shaw, Newby and others as fraudulent, the court rendered judgment, setting aside as fraudulent the conveyances it had already set aside as fraudulent in appellants' action, and, in addition thereto, it set aside the sheriff's sale which appellants had had on their judgment, and enjoined the sheriff from delivering appellants a deed on their certificate of purchase. This judgment provided that the real estate in controversy should be sold as the real estate of Shaw and Newby, and that the proceeds of the sale should be applied to the payment of judgments against Shaw and Newby in the order in which they had been taken, to wit: William B. Maddox, April the 7th, 1874, $1,144; Charles Tachau et al., May the 2d, 1874, $732; John O. Fiedeldey, June 2d, 1874, $658.26. The superior court in general term, on the 5th of March, 1877,

modified this judgment, by directing that Fiedeldey be first paid out of the proceeds of the sale of said real estate, because of his superior diligence in first bringing his action to subject said real estate to the payment of the debts of Shaw and Newby. Copies of the pleadings, orders and judgment in the case sought to be reviewed, were filed with the complaint.

The error assigned in the complaint of the appellants is, that the court, in the action sought to be reviewed, erred in ordering Fiedeldey's judgment to be first paid out of the proceeds of the real estate adjudged liable to be sold to pay the debts of Shaw and Newby; that the fraudulent conveyances, by which Shaw and Newby had attempted to place said real estate beyond the reach of their creditors, were first set aside, and declared fraudulent in the suit instituted in said superior court by the appellants; and that, as this fact appeared in Fiedeldey's complaint in the suit commenced in said court by him for the same purpose, and sought to be reviewed in this action, the court should have held that the appellants were entitled to priority, and directed that their judgment against Shaw and Newby be first paid out of the proceeds of the sale of said real estate. The prayer is, that the judgment be so modified and corrected as to give the appellants priority over the other creditors of Shaw and Newby.

To this complaint there was a demurrer, which was sustained. The cause was taken by appeal to the general term. The sustaining of the demurrer was assigned as error; the judgment in special term was affirmed; the error assigned here is the affirmance in general term of the judgment in special term.

To the action sought to be reviewed, the appellants made default. It does not appear that any objection was made by them to the judgment rendered in that case. They were not present at the time, nor is it shown that they have at any time since, by motion or otherwise, asked the court below to correct the errors complained of. The complaint to review the judgment is the first step taken to correct the alleged error.

The proceedings under review were had against the appellants upon their default. No objection to them was made or exception taken. Can the appellants avail themselves of the alleged error by a complaint to review? Can they, by filing such a complaint, make the action of the court below erroneous, without objection or exception, and without giving the court an opportunity to correct the error, if there was any?

A complaint to review a judgment for error apparent upon the face of the proceedings is, in effect, the same as an appeal to this court. No error in the court below, not available on appeal, can be reached or brought before the court on a complaint to review. *Barnes* v. *Wright*, 39 Ind. 293; *Barnes* v. *Bell*, 39 Ind. 328; *The Indianapolis Mutual F. Ins. Co.* v. *Routledge*, 7 Ind. 25. In the last case, the court says: "That the mode of procedure and judgment, on review, in the circuit court, is in effect the same as on appeal in this court." *Hardy* v. *Chipman*, 54 Ind. 591; *Richardson* v. *Howk*, 45 Ind. 451; *Dunkle* v. *Elston*, 71 Ind. 585; *Searle* v. *Whipperman*, 79 Ind. 424.

These cases show that a proceeding to review a judgment for error apparent upon the face of the proceedings is the same in effect as an appeal, and that no error of the court below is available in proceedings to review that is not available on appeal; that an error deemed to be waived on appeal, will be regarded as waived on review.

In the case of *Barnes* v. *Wright*, *supra*, the court says: "Where the defendant has been brought into court, and has suffered a judgment to be rendered against him by default, he cannot appeal to this court for the correction of any supposed error in the judgment, without having first applied to the court below for the correction." In this case, the appellants, not having objected or complained of the alleged errors in the court below, must be deemed to have waived them. The priority given to Fiedeldey in the judgment under review was not, in the absence of any objection or exception, erroneous. Such a judgment would be binding and valid if assented to by

the parties. No objection having been at any time made, such assent will be presumed. *Richardson* v. *Howk, supra;* Iglehart's Pl. and Pr. 452.

The complaint does not show that there is any available error in the judgment and proceedings sought to be reviewed. The judgment below should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellants.

ON PETITION FOR A REHEARING.

MORRIS, C.—The counsel for the appellant have filed a very earnest petition for a rehearing in this case. They insist that the error by them assigned is, that the complaint in the action sought to be reviewed does not contain facts sufficient to constitute a cause of action, and that in deciding the case this was overlooked by the court. Such an assignment would bring before the court the sufficiency of the complaint.

We have again carefully examined the record, and have been unable to find any error assigned, calling in question the sufficiency of the complaint.

An assignment of error, either upon appeal to this court or in a bill of review, for insufficiency of facts, which questions less than the whole complaint, is insufficient. *Reyman* v. *Mosher*, 71 Ind. 596; *McCallister* v. *Mount*, 73 Ind. 559; *Wagner* v. *Wagner*, 73 Ind. 135. The complaint must be questioned as a whole; it is not enough to question one of several paragraphs. And it has been held at this term, in the case of *Searle* v. *Whipperman*, that such an assignment will be unavailing, if the complaint entitles the party to any relief.

In the complaint to review, it is stated that there is error in the finding and decree sought to be reviewed, in this, that by the decree John C. Fiedeldey was adjudged, for certain reasons stated, to have the first lien, to be first paid out of the proceeds of certain real estate, the title to which had been

fraudulently conveyed by the judgment debtors, which conveyances were, in said action, set aside as fraudulent. The complaint then proceeds to state, in substance, that it appeared upon the face of the third paragraph of Fiedeldey's complaint, that the appellants had obtained a judgment against Shaw and Newby before Fiedeldey had obtained his judgment; that they had also instituted a suit in the superior court to enforce their judgment against the real estate described in Fiedeldey's complaint, before Fiedeldey had commenced the suit sought to be reviewed; that in such suit the appellants obtained against the proper parties a decree setting aside, as fraudulent, the conveyances set aside by the decree under review, and an order directing its sale for the satisfaction, first, of their judgment against Shaw and Newby; that these facts were all apparent upon the face of the third paragraph of Fiedeldey's complaint. It is alleged that the court, in the action sought to be reviewed, should have found that the appellants' judgment was the first lien, and by its decree it should have ordered it to be first paid out of the proceeds of the real estate ordered to be sold.

The prayer is that the decree sought to be reviewed be reversed; that the appellants have a finding and decree in their favor; that their judgment against Shaw and Newby, in conformity with the facts stated in the third paragraph of Fiedeldey's complaint, be declared the first lien upon, and ordered to be first paid out of, the real estate ordered to be sold.

It is clear that this assignment does not question the sufficiency of the complaint in the action sought to be reviewed. It does not refer to the first paragraph of the complaint at all. Had the decree given the appellants the first lien, they would, doubtless, have been satisfied. They complain because the court did not do this. But should it be admitted that the complaint to review does question the sufficiency of the third paragraph of Fiedeldey's complaint, it can not be pretended that it in any way calls in question the first. The appellants are made parties to the first paragraph and alleged to be judg-

ment creditors of Shaw and Newby. This paragraph was abundantly sufficient to entitle Fiedeldey to some relief. Counsel say that the appellants were not notified of the pendency of the suit sought to be reviewed until after the third paragraph of Fiedeldey's complaint was filed, and were called into court to answer it alone. The record which they have brought into this court does not show these facts. They were made parties to the first complaint filed, and, in the absence of anything to the contrary, they will be presumed to have been in court to answer as to the whole complaint.

If, as the appellants have stated in their complaint, the court below erred in adjudging Fiedeldey entitled to priority, and in not holding that the appellants were entitled to such priority, the error could not be corrected by a proceeding to review, or by appeal to this court, without first giving the court below an opportunity to correct it.

There is nothing in the opinion in this case in conflict with the rulings of the court in *Odell* v. *Carpenter*, 71 Ind. 463. There was no error in taking the default against the appellants—it was properly taken. A motion to set it aside could not, therefore, present any error to the court below for correction. Nor is the case of *Odell* v. *Carpenter*, in conflict with *Barnes* v. *Wright*, 39 Ind. 293. In the latter case, there was no motion to set aside a default, nor was anything said in the opinion about a default. The court below had erroneously rendered judgment for too much—entered a wrong judgment, which was sought to be corrected on appeal. This, the court held, could not be done without first giving the court below an opportunity to correct the judgment. This was all and precisely what the court decided. No such question was presented or decided in the case of *Odell* v. *Carpenter*. It had been held long before the case of *Barnes* v. *Wright* was decided, that it was not necessary to move in the court below to set aside a default in order to take an appeal. Indeed, where the default had been, as in the case of *Barnes* v. *Wright*, properly taken, it would be nonsense to make such a

motion, for it would necessarily be unavailing. But a wrong judgment may be rendered against a party properly defaulted. Where such is the case, the party against whom the error has been committed must, in a proper way, present it to the court which made the error, for correction. This, as we understand the rulings of this court, can not be done in the first instance by a complaint to review.

In the case of *Searle* v. *Whipperman*, the case of *Berkshire* v. *Young*, 45 Ind. 461, is modified; as modified, it is in harmony with the opinion in this case.

The petition should be overruled.

PER CURIAM.—Petition overruled.

No. 8517.

CORBALEY, ADM'R, *v.* STATE, EX REL. HOLMES ET AL.

DECEDENTS' ESTATES.—*Claims.—Principal and Surety.*—Prior to the statute of 1881 (R. S. 1881, section 2311), an ordinary suit might be brought against a principal debtor, and the administrator of his surety; and if the principal was not served with process, the suit might go on against the administrator alone, unless objection was made by motion before pleading.

GUARDIAN AND WARD.—*Action on Bond.—Pleading.—Appraisement.*—A complaint on a guardian's real estate bond, to recover for failure to account for the proceeds of the real estate sold, need not show an appraisement of the real estate.

SAME.—*Set-Off.—Answer of Surety.*—In such an action, the guardian being the father of the wards, and answer of set-off by the surety, alleging that the wards were indebted to the guardian in a sum named, "for board, clothing and maintenance," is bad on demurrer.

SAME.—An answer in such case by the surety, that, the wards being of tender years and unable to earn support, the guardian, who was their father, being destitute of means to support and educate his children and wards, was compelled to apply thereto the proceeds of said real estate, and now refuses to make claim against them on account thereof, is sufficient.

SAME.—*Statute of Limitations.*—An answer, in such case, by a surety, alleging that the cause of action did not accrue within three years next before the commencement of the action, is bad.

From the Marion Circuit Court.

R. Hill and *J. W. Nichol*, for appellant.

H. J. Milligan, for appellees.

ELLIOTT, C. J.—This action is upon a bond executed by Jonathan L. Holmes, guardian of the relators, in proceedings had upon petition for the sale of their real estate. Pence, the appellant's intestate, was the surety on this bond. The breaches assigned are, failure to render accounts current, failure to pay over or account for the avails of the sale of the real estate of relators, and conversion thereof.

The appellant insists that the court erred in overruling his demurrer to the complaint. The first proposition stated in support of this contention is, that the remedy adopted is not the appropriate one, but that the claim should have been filed against the estate of the decedent. This objection is presented in another form, that of a motion for want of jurisdiction, but the entire question may be disposed of at the outset. The motion to dismiss was not filed until after a demurrer had been interposed and overruled, and an issue joined upon appellant's answer. It is clear that the court had jurisdiction of the subject-matter. The principal was certainly a proper party to the action. It is settled that the administrator of a deceased joint debtor may be sued jointly with the survivor. *McCoy* v. *Payne*, 68 Ind. 327; *Milam* v. *Milam*, 60 Ind. 58; *Braxton* v. *The State*, 25 Ind. 82; *Wright* v. *Jordan*, 71 Ind. 1. The principal obligor was sued with the administrator and this gave the proceeding the character of an ordinary action. *Martin* v. *Asher's Adm'r*, 25 Ind. 237; *Owen* v. *State*, 25 Ind. 107.

The motion of appellant came too late to have availed him, even if he had been sued alone. *Morrison* v. *Kramer*, 58 Ind. 38, decides that where an administrator is sued in the

ordinary mode he must object before joining issue. It was there said by HOWK, J.: "If, however, he" (the administrator) "appears fully to the action and demurs to or answers the claim or complaint, we think he thereby waives, as he has a perfect right to do, any objection to the claim on the ground that it was not filed in the clerk's office, nor placed on the appearance docket, as contemplated by said 66th section of said decedents' act."

It is proper to observe that, upon one point, *Braxton* v. *The State, supra,* has been overruled by *The State, ex rel.*, v. *Wyant,* 67 Ind. 25, 33, but not on the point upon which it is here cited. The case of *Stanford* v. *Stanford,* 42 Ind. 485, relied upon by the appellant, is expressly overruled in *Morrison* v. *Kramer, supra.* The cases of *Hyatt* v. *Mavity,* 34 Ind. 415, and *Noble* v. *McGinnis,* 55 Ind. 528, can not be regarded as in point, for two reasons, (1) the action is against the administrator of the decedent and another person; (2) the motion in those cases was made before any demurrer or answer was filed. If the motion to dismiss had been made before an issue of law or fact had been tendered or joined, a different question would have been presented.

The objection, that the complaint does not show an appraisement of the land, is entirely destitute of merit. The guardian can not hold money obtained from the sale of his ward's land upon the ground that the proper appraisement was not made. To permit him to do so would be equivalent to rewarding him for a plain and express breach of duty.

We have not lost sight of the fact that process was not served upon the principal in the bond. This we do not regard as depriving the court of jurisdiction. The filing of the complaint invoked the jurisdiction of the court over the subject-matter. If there was any reason why it should not have extended over the person of the appellant, he should have availed himself of it before tendering and joining an issue of fact upon the merits of the action. The principle of *Morri-*

son v. *Kramer* goes much beyond what we need to do here to uphold the jurisdiction of the trial court.

The second paragraph of the answer alleges that the relators were indebted to their guardian in the sum of two thousand dollars for their board, clothing and maintenance, which sum appellant offers to set off against a like amount owing upon the claim of the appellees. We think the answer is bad. The general rule is, that it is the duty of a father to support his children. There is no fact stated in the answer under mention, which takes the case out of the operation of this rule. The party who affirmatively pleads must state facts avoiding the allegations which he confesses. There is nothing in this answer avoiding the facts confessed. It may be true that the father did support and maintain his children, the relators, and yet there be no ground upon which to base a claim for their maintenance and support. *Prima facie*, the father has no right to charge his children for their support and maintenance, and it is for him to show why this *prima facie* case shall not prevail against him. This showing must be made by stating facts, and not by stating mere general conclusions.

The substantive allegations of the third paragraph of answer are these: On the 30th day of January, 1856, Elizabeth Holmes, the wife of Jonathan L. Holmes, and the mother of the relators, died seized of the real estate described in the complaint; that at the time of her death one of the relators was seven years of age, one five years of age, one four years of age, and one three years of age; that, when the real estate was sold, the relators were still very young, and wholly unable to earn their own support; that the father and guardian was very poor, and destitute of the means to support his children, and was unable to labor; that he was compelled to and did apply "to the boarding, clothing, supporting and educating of his minor children and wards the entire sum which he had realized from the sale of the said real estate." It is also alleged that the guardian refuses to make any claim for the

support of his said wards, but wrongfully allows them to compel payment of money which has been expended for their maintenance.

The answer, in all material respects, is within the principle deducible from the decision in *Myers* v. *The State, ex rel.*, 45 Ind. 160. Following that case, it must be held good. Unless we overrule the doctrine of that case, we must hold the answer before us sufficient. The case is cited, with approval, in *Glidewell* v. *Snyder*, 72 Ind. 528. We do not feel warranted in overruling the case referred to, and are, therefore, constrained to hold that the court erred in sustaining appellees' demurrer to the third paragraph of the answer.

The appellant filed the following answer: "Said defendant, for further and separate answer to the claim of the relator John Holmes, says that the alleged cause of action, set forth in the complaint of said relator, did not accrue within three years next preceding the commencement of this action."

The case of *The State* v. *Hughes*, 15 Ind. 104, relied on by the appellant, is not in point. That case decides that actions upon the bond of a guardian must be brought within three years after final settlement. In the present case, there has been no such settlement. Where there has been no report and no settlement, the plea of the three years statute is unavailing.

Judgment reversed.

On Petition for a Rehearing.

Elliott, C. J.—In the former opinion, we treated this case as within the rule in *Myers* v. *The State, ex rel.*, 45 Ind. 160, and, notwithstanding appellees' elaborate argument, we have seen no reason to change our minds. We are satisfied that the principle there approved is a sound one. If children possess an estate, their father and guardian none, and both children and father are unable to work, the estate of the former may justly be applied to their education and maintenance. It is better that their estate should be used for their education and sup-

port than that they should lack the ordinary comforts of life, or grow up without the important benefit of an education.

The proper way, undoubtedly, is for a guardian to apply to the court for an order directing the use of the money of the ward for his education and maintenance. We are not willing, however, to hold that, because he does not make such an application, he can not, when sued upon his bond, show in defence a just and reasonable application of the money of his ward to that purpose. We think the case of *The State, ex rel.*, v. *Clark*, 16 Ind. 97, cited in *Myers* v. *The State, ex rel.*, settles, and rightly settles, the principle that, although no allowance has been made for money so expended, the guardian may, in defence to an action on the bond, avail himself of such expenditures. The case of *Haase* v. *Roehrscheid*, 6 Ind. 66, establishes the rule that even a father will be allowed for the education of the child, if he is unable to himself educate it.

In cases where no allowance has been made, the burden is upon the guardian to show the inability of the father to support and educate the child, and the inability of the child to earn its own support, as well as the honest and reasonable use of money for that purpose.

Petition overruled.

No. 8677.

McElhoes *v.* Dale.

New Trial.—*Practice.*—*Recovery.*—A motion for a new trial, on the ground that the finding is contrary to law, or to the evidence, presents no question in reference to the amount of the recovery.

From the White Circuit Court.

H. P. Owens and *W. E. Uhl*, for appellant.

WOODS, J.—The only error assigned is the overruling of the appellant's motion for a new trial. The causes stated in the motion for a new trial are:

1st. The finding of the court is contrary to law.

2d. The finding is contrary to the evidence.

3d. The finding is contrary to the law and the evidence.

The entire brief of the appellant is addressed to the proposition that the amount of the recovery was too large by the sum of one hundred and fifty dollars, and interest thereon from the date when it ought, as is claimed, to have been credited on the note sued on, it being conceded that the finding in favor of the plaintiff for a small amount is right. The causes alleged in the motion for a new trial, it is manifest, do not present the question discussed. In order to raise a question as to the amount of damages, or of the recovery, the new trial must be moved for on the ground of excessive damages, or for error in the assessment of the amount of the recovery. Code 1852, sec. 352; R. S. 1881, sec. 559; *Spurrier* v. *Briggs*, 17 Ind. 529; *Rosenbaum* v. *McThomas*, 34 Ind. 331.

Judgment affirmed, with costs.

ON PETITION FOR A REHEARING.

WOODS, J.—Counsel for the appellant now say that "any concession made in their original brief that anything is due on the note in suit, or that a judgment for any sum whatever should have been rendered in favor of the appellee, is not warranted by the evidence," and ask a rehearing, in order that the case may be considered from the standpoint so suggested.

We are not disposed to depart from the rule which forbids the raising of new questions, especially by the appellant, in a petition for a rehearing.

The petition overruled, with costs.

No. 8683.

Butt v. Jennings School Township.

Mistake.—*Voluntary Payment.*—Money paid through a mistake of facts, with the means of knowing the facts within reach of the party, can not be recovered back.

Township Trustee.—*Settlement.*—*Mistake.*—When a township trustee fails to keep the accounts required by law, and by reason thereof, and by reason of mislaying a voucher, he fails in his annual settlement with the county commissioners to claim or receive credit for a sum properly paid out by him, he can not afterwards recover for the amount so paid.

Same.—*Statute of Limitations.*—When a school township trustee, by mistake, advances money for the school township, which, in his annual settlement, is found to be due to him, and so entered of record, a suit to recover the amount is founded, not upon the record, but upon the advancement of the money, and the statute of limitations begins to run at the date of the settlement, and six years is a bar.

Same.—*Complaint.*—*Demurrer.*—*Practice.*—A complaint by a township trustee to recover a balance found due him on settlement with the county commissioners, brought after the lapse of six years from the settlement, shows by inevitable inference that the case is not within any of the exceptions to the statute of limitations, and is barred by that statute; and, in such case, the question of the statute is presented by demurrer for the want of sufficient facts.

From the Scott Circuit Court.

C. L. Jewett, for appellant.

W. K. Marshall, for appellee.

Morris, C.—The appellant sued the appellee to recover back money alleged to have been paid to it through a mistake in a settlement made by the appellant as trustee of the appellee, with the Board of Commissioners of Scott County.

The complaint is in three paragraphs. The first and second are substantially the same. They allege that on the 21st day of July, 1864, the appellee was indebted to one William Kinsey in the sum of $162, for work and labor performed, and materials furnished in building a school-house for the appellee, and within its limits; that Thomas Carr, then trustee of the appellee, executed and delivered to said Kinsey a warrant

on the treasurer of the appellee, for said sum; that on the 1st day of April, 1865, the appellant was duly elected and qualified as trustee of said Jennings township, and continued to hold said office until April, 1867; that on the 1st day of July, 1865, said warrant not having been paid, the said Kinsey presented the same to appellant, as such trustee, for payment; that, having the necessary funds in his hands as such trustee, he paid said warrant, with the interest thereon, amounting to $173, to said Kinsey, and received from him said warrant, as a voucher and as evidence of payment; that he kept no account or memorandum of the money so paid, other than by said voucher; that after he had made such payment, and before the 3d day of September, 1867, said warrant was, without fault of the appellant, mislaid and lost, and so remained until the 1st day of March, 1879; that on the 3d day of September, 1867, after the expiration of the plaintiff's term of office, he made a final settlement with the board of commissioners of the county of Scott, of his receipts and disbursements, acts and doings as the trustee of said Jennings School Township; that because of the loss of said warrant and voucher he did not know that he had paid said Kinsey the sum of $173, and that he was, in said settlement, entitled to credit for the same; that the board of commissioners did not know that he had made such payment; that thereby there "arose and existed a mutual mistake between the appellant and said board at the time of said settlement, from which it was mutually believed that appellant had not paid said sum to said Kinsey; that, because of said mistake, the board required the appellant to pay, and he did, on said 3d day of September, 1867, pay over to the treasurer of Scott county, said sum of $173, being the amount paid by him to said Kinsey, on said warrant, for the use of the appellee; that the appellant did not discover said mistake and lost warrant until the 1st day of March, 1879, and immediately thereafter he notified said board and the appellee of said fact, and requested each to correct said mistake, which they refused to do.

The third paragraph states that the appellant had been elected and qualified as trustee of Jennings township on the 1st day of April, 1865; that there came into his hands, as such trustee, $700 belonging to the special school fund of said township; that during the time the appellant was trustee of said township, he paid out the whole of said fund of $700 to persons having demands and warrants upon said school township, and by mistake paid out of his own funds $338.43; that in a settlement made with the board of commissioners of Scott county, on the 3d day of September, 1867, upon a full report made by him, to the board, of his receipts and disbursements, acts and doings as such trustee, it was found and determined that the appellant had paid, of his private funds, the sum of $338.43, and that it was further found and agreed by said board that the appellee was indebted to the appellant in said sum of $338.43, and the fact entered upon the order book of said board, a copy of which is filed with this paragraph; that said sum is due and unpaid.

So much of the settlement with the board as is material is as follows:

"COMMISSIONERS' COURT, SEPT. TERM, 1867.

"Now comes John B. Butt, Sr., ex-trustee of Jennings township, and makes final settlement, to wit:

Dr., to common school fund, June term, 1867 . .	$675 30
Cr., by voucher on treasurer	675 30
Dr., to road fund	$316 65
Cr., by certificate from treasurer.	306 77
	$9 88
Cr., by voucher cash over treasurer	9 88
Due ex-trustee from township fund.	$162 87
Due ex-trustee from special school fund.	338 43"

The copy of the record filed with the third paragraph of the complaint, shows that the common school fund and the road fund, in the hands of the appellant, had been adjusted and settled, but nothing more is said about the special school fund.

The appellant demurred to each paragraph of the com-

plaint. The demurrers were sustained. The appellant elected to stand by his complaint, and final judgment was rendered in favor of the appellee.

The error assigned is the sustaining of the demurrers to the complaint.

Did the court err in sustaining the demurrers to the first and second paragraphs of the complaint? These paragraphs are substantially the same. By the law in force at the time, it was provided that "The trustee shall examine and settle all accounts and demands chargeable against his township, and shall keep an accurate account current with his township, which shall be so arranged and kept as to show the amount received and paid out on account of separate and distinct funds, and to whom paid, as well as the whole receipts and expenditures, by one general account, and shall file all accounts as vouchers, and report the same to the county board in his annual settlement therewith." Section 10, 1 R. S. 1876, p. 901. Section 7 of the act of 1865, 3 Ind. Stat. 442, in force at the time this mistake is alleged to have been made, is substantially the same as the above provision, and requires such accounts to be kept by the trustee of the special school fund.

The manifest purpose of these provisions of the statute is to require the trustee to keep such a record of the receipts and expenditures of money as will render such a mistake as that alleged to have been made by the appellant impossible—to compel him to keep an accurate record of the money by him received and paid out as trustee, so that he may know at all times just how he stands with his township. If the appellant kept an account of the money paid out by him while trustee, he had the means of knowing, at the time he settled with the board, though he had previously lost the warrant, how much he had paid Kinsey; if he did not keep an account of the money so paid, he was guilty of gross and inexcusable official negligence and misconduct. The appellant says, in the paragraphs under consideration, that he kept no account of the money paid to Kinsey. He offers no excuse for this gross

dereliction of official duty. Because of this failure to obey the law, he says he forgot, and did not know at the time he settled with the board, that he had paid Kinsey out of the special school fund $173. Though not impossible, it seems improbable, that he should have made such a payment and have forgotten it, though he had mislaid the warrant. His ignorance of the fact was the result of his own negligence, for which he offers no excuse. In view of the law and the alleged facts, should the appellant be allowed to open up a settlement made by him as trustee ten years before, and based upon his official statements, because of an alleged mistake, resulting from his avowed official negligence?

It is said, in the case of *Board of Commissioners, etc.*, v. *Gregory*, 42 Ind. 32, that money, paid through a mistake of facts, with the means of knowing the facts within the reach of the party making the mistake, can not be recovered back. Why not? Obviously because in such case the mistake is the result of the party's negligence. This is the only reason for which the recovery could be denied. In this case, it may be said that, at the time the mistake occurred, the appellant had not the means of knowing the facts. But his want of the means of knowing the facts, as well as the mistake itself, was the result of his gross official negligence. It may be said that mistakes always result from omissions or inadvertence. But there is a palpable difference between omissions and gross and wilful neglect of duty. The former are excusable; the latter are without excuse. Reasonable diligence in the discharge of his duty would have rendered the mistake which the appellant claims to have made impossible; to grant him the relief asked, would be to encourage negligence in the discharge of official duty. This should not be done. *Beaver* v. *Trittipo*, 24 Ind. 41. We think there was no error in sustaining the demurrers to the first and second paragraphs of the complaint.

Did the court err in sustaining the demurrer to the third paragraph of the complaint?

The appellee insists that it does not state facts sufficient to

constitute a cause of action. It states that the appellant was acting as the duly elected trustee of Jennings School Township—the appellee—from April, 1865, to April, 1867; that, as such trustee, he paid by mistake, out of his private means, $338.43, for the use and benefit of the appellee, and that, in his settlement as such trustee with the board of commissioners of Scott county, he was allowed said sum against the appellee. The statement in the record of the settlement is, "Due ex-trustee from special school fund, $338.43." This statement is not the cause of action. The advancement of the money for the use and benefit of the appellee is the cause of action. It also appears, from the facts stated, that if the money was paid out by mistake, the mistake had been discovered and was known to the parties at the time the settlement was made, else the board could not have made the entry that it was due the appellant. The cause of action must be held to have accrued on the 3d of September, 1867. Is the cause of action barred by the statute of limitations, and is the question raised by the demurrer? The question is not raised, unless it appears upon the face of the complaint that the cause of action accrued more than six years before the commencement of the suit, and that neither party is within any of the exceptions contained in the statute.

The cause of action is shown to have accrued in September, 1867, more than six years before the commencement of the suit. It is also shown that from April, 1865, to April, 1867, the appellant was acting as the duly elected and qualified trustee of the appellee, and that, on the 3d day of September, 1867, he was present before the board of commissioners of Scott county, settling his accounts as such trustee. It therefore appears from the complaint, not by direct averment, but by inevitable inference, that, at the time the cause of action accrued, the appellee existed in Indiana and could not exist elsewhere; that the appellant was not a married woman; that he was not under the age of twenty-one years, nor of unsound mind, nor imprisoned, nor out of the United States. It follows, therefore,

that, at the time the cause of action accrued, neither party was under any disability, and that the case is not within any of the exceptions contained in the statute. The question of the statute of limitations is raised by the demurrer, and is a bar to the third paragraph of the complaint. There was no error in sustaining the demurrer.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

No. 8965.

COLLINS *v.* NELSON ET AL.

FRAUDULENT CONVEYANCE. *—Creditor's Bill.—Defence.*—In a suit by a creditor to set aside a conveyance of real estate, alleged to have been executed by his debtor for the fraudulent purpose of cheating, hindering and delaying the creditor in the collection of the debtor's indebtedness to him, the answer of the debtor, to the effect that, at the time of the commencement of the suit, no part of his indebtedness to the creditor was due and unpaid, will constitute a complete defence, in bar of such suit.

From the Ohio Circuit Court.

J. B. Coles and *W. S. Holman*, for appellant.

A. C. Downey, for appellees.

HOWK, J.—This was a suit by the appellant to set aside a certain deed alleged to have been executed on the 12th day of August, 1876, by the appellee Samuel T. Nelson, to his co-appellee, Mary Nelson, then his wife, without any valuable consideration whatever, and for the sole purpose of hindering, cheating, delaying and preventing the appellant from collecting the just indebtedness to him of said Samuel T. Nelson, and to subject the lands therein described to sale for the payment of said indebtedness. The appellees jointly answered in three paragraphs, of which the first was a general denial, and

each of the other two paragraphs stated a special defence. The appellant's demurrers to each of the second and third paragraphs of answer, for the alleged insufficiency of the facts therein to constitute a defence to his action, were severally overruled by the court, and to each of these rulings he excepted. He refused to reply to either of said paragraphs of answer, and the court then adjudged that he take nothing by his suit, and that the appellees recover of him their costs in this action expended.

Errors have been assigned by the appellant in this court, which call in question the decisions of the circuit court in overruling his demurrers to each of the second and third paragraphs of appellees' answer.

In each of these paragraphs of answer, the appellees relied upon substantially the same facts, as constituting a defence to the appellant's action. In the second paragraph of their answer, the appellees said, in substance, that true it was that judgment was rendered against said Samuel T. Nelson, as alleged in appellant's complaint, but they averred that the same was rendered on a mortgage executed by said Samuel T. Nelson, and the notes therein mentioned for the payment of the following sums, of $700 each, maturing respectively on the first days of April, in each of the years from 1877 to 1883 both inclusive, and of $400 due on April 1st, 1884; that, by the sale of the mortgaged premises, the first five of said notes were fully paid, and the sum of $496.25 was paid on the sixth note, which would mature on the first day of April, 1882; that, in a proceeding had in the court below, at its October term, 1877, subsequent to the sale of said mortgaged premises, of which the appellant had due notice and to which he appeared, the court found that there would be due the appellant on the note which would mature on the first day of April, 1882, a balance of $332.90; on the note which would mature on the April 1st, 1883, the sum of $994; and on the note which would mature on April 1st, 1884, the sum of $592; and that the appellant should not be entitled to execution for

the collection of said unpaid sums, until they severally matured, and, if they should be replevied, not until after the stay of execution. Wherefore the appellees said that the appellant had no right or cause of action.

In the third paragraph of their answer, the appellees said that, before the commencement of this action, the said Samuel T. Nelson had fully paid, satisfied and discharged all of his indebtedness to the appellant, which had then matured, or which would mature prior to the first day of April, 1882.

It will be readily seen that each of these paragraphs of answer is based upon the theory that the appellant could have no cause of action against the appellees, or either of them, for the recovery of the debt sued for, until at least a part of such debt became due and payable. This theory is sound and reasonable. The record shows that this action was commenced on the 9th day of October, 1877. It appeared, from the facts alleged in each of the second and third paragraphs of answer, admitted to be true by the appellant's demurrers thereto, that, at the time he commenced this suit, nothing whatever was due him from the appellees, or either of them. Indeed, by his demurrer to the second paragraph of answer, he admitted that nothing whatever would be due him from either of the appellees, until more than four years after the commencement of this suit. The general rule is, that an action will not lie for the recovery of a debt until some part of it, at least, becomes due and payable; and we know of no good reason why this rule should not be applicable to such cases as the one at bar. This precise question was before this court in the recent case of *Evans* v. *Thornburg*, 77 Ind. 106. In that case, it appeared that one Passwater, being indebted to the appellants, A. S. Evans & Co., executed a voluntary conveyance of forty acres of land to his daughter, Mrs. Jane Thornburg, with the fraudulent intent, etc.; and that, more than five months before such indebtedness became due, the said A. S. Evans & Co. commenced a suit for the recovery of the debt, and to have Passwater's conveyance to Mrs. Thorn-

burg declared fraudulent and void as to them, etc. It was held that the suit had been prematurely instituted. Speaking for the court, NIBLACK, J., said: "Until the note became due no right of action accrued to the plaintiffs upon it, and, until a right of action accrued to them upon the note, they were not authorised to demand that the land conveyed to Mrs. Thornburg should be made subject to its payment, conceding the conveyance to her to have been fraudulent as against them. More briefly stated, the plaintiffs had no right to demand payment of the note, either by suit or otherwise, until it became due."

The case cited is decisive of the case now before us. The facts stated by the appellees, in each of the second and third paragraphs of answer, constituted a complete bar to the appellant's present action; for they clearly showed that, when he commenced this suit, there was nothing due him from the appellees, or either of them, on the alleged indebtedness described in his complaint. We are of the opinion, therefore, that the court did not err in overruling the demurrers to the second and third paragraphs of answer.

The judgment is affirmed, at the appellant's costs.

No. 8231.

81 78
137 210
81 78
136 388

WASHER *v.* THE ALLENSVILLE, CENTER SQUARE AND VEVAY TURNPIKE COMPANY.

PLEADING.—*Complaint.— Turnpike Company.— Corporate Existence.*—In the complaint of a turnpike company, an allegation of the date when its articles of association were filed sufficiently shows the beginning of its corporate existence.

SAME.—*Corporation.*—In the complaint of a corporation, the pleader is not required to allege every fact necessary to its original organization, or anticipate supposed defences growing out of irregularities occurring in or after the election of directors.

Washer v. The Allensville, Center Square and Vevay Turnpike Company.

COURTS.—*Adjourned Terms.—Reason for Adjournment.*—The act of March 7th, 1877, regarding adjourned terms, Acts 1877, Reg. Sess., page 28, repealed the act of February 12th, 1855, R. S. 1881, section 1333, but not section 793, 2 R. S. 1876, p. 313, R. S. 1881, section 1332.

SAME.—*Jurisdiction.*—An order November 6th, 1878, reciting that the October term would expire by limitation November 9th, 1878, leaving business pending and undisposed of for want of time, appointing an adjourned term for Monday, November 11th, 1878, and directing publication, supplemented by a like order November 9th, 1878, and due proof of the publication of a copy of the order in the designated paper, November 7th, 1878, show a substantial compliance with the statutes, and that the court meeting Monday, November 11th, 1878, had jurisdiction of parties appearing without objection, and of the subject-matter of their cause tried before a jury.

EVIDENCE.—*Turnpike Company.—Lost Articles of Association.—Copy.*—Where it is proved that the original articles of association of a turnpike company are lost, the record of the copy filed in the recorder's office may be given in evidence.

SAME.—*Books of Corporation.*—The books of a corporation are competent evidence for and against its members in an action between the corporation and its members.

PRACTICE.—*Instruction.—Directing Verdict.*—The court may, in a proper case, when the evidence is all in, direct the jury to find a verdict in favor of the party entitled to it.

SAME.—*Supreme Court.—Record.—New Trial.*—Unless the record elsewhere show the action of the court complained of in a motion for a new trial, no question arises for the decision of the Supreme Court.

TURNPIKE.—*Location.*—The description of a turnpike in the articles of association of the company organized to build it, is a location.

From the Switzerland Circuit Court.

S. Carter and *J. B. McCrellis*, for appellant.

W. D. Ward and *T. Livings*, for appellee.

BICKNELL, C. C.—This was an action by the appellee against the appellant to recover fifty dollars, the price of two shares of the capital stock of said company subscribed for by the appellant.

A demurrer to the complaint for want of facts sufficient, etc., was overruled.

The answer was in two paragraphs, duly verified. The first paragraph was a general denial of "every allegation of the complaint, including the execution of the instrument sued on."

The second paragraph was a plea of *nul tiel* corporation.

The issues were tried by a jury, who returned a verdict for the plaintiff, the appellee. From the judgment on that verdict this appeal was taken.

A motion for a new trial was overruled.

The appellant assigns errors as follows:

1. In overruling the demurrer to the complaint.

2. That the court had no jurisdiction of the subject of the action and no jurisdiction to try the action, at the time it was tried.

3. That the court erred in overruling the motion for a new trial.

The complaint avers the corporate existence of the plaintiff, for the purpose of building a gravel road from Allensville to the end of the Vevay, Mt. Sterling and Versailles turnpike in Switzerland county, Indiana, in all a distance of five miles; that the articles of association of said corporation were filed in the recorder's office of said county on the second day of January, 1870; that a board of directors of said corporation was duly elected by its stockholders, and duly qualified; that said directors entered upon the discharge of their duties; that the defendant subscribed for two shares of $25 each of the capital stock of said company for the construction of said road; that said board, before this suit was commenced, made an order, requiring the subscribers to said stock to pay the amount of their unpaid subscriptions to David Scott, the treasurer of said corporation, at his residence in Jacksonville, on or before April 1st, 1872; that notice of said order was duly given; by publishing the same in the *Vevay Reveille*, on March 2d, 1872, the same being a newspaper printed and published in said county; that said subscription is due and unpaid, and the payment thereof has been unreasonably delayed, and that plaintiff is entitled to interest thereon from said April 1st, 1872. Wherefore, etc.

A copy of the said articles of association was annexed to the complaint and made part thereof, and was as follows:

"We, whose names are hereto subscribed, form ourselves into a corporation for the purpose of constructing and owning a macadamized turnpike from the town of Allensville to the end of the Vevay, Mt. Sterling and Versailles turnpike in Switzerland county, Indiana.

"Said corporation shall be known as the Allensville, Center Square and Vevay Turnpike Company. Said road shall be built and constructed from Allensville to the end of the Vevay, Mt. Sterling and Versailles turnpike, commencing at Allensville and running thence on the Vevay and Lawrenceburgh road, to the State road leading from Vevay to East Enterprise; thence on said highway leading from said Vevay and Lawrenceburgh road to said Vevay and Enterprise road, to Center Square; thence on said Vevay and East Enterprise road, to the end of the Vevay, Mt. Sterling and Versailles turnpike, near the residence of James Brown, or as near the above named route as a good, practicable way for said road can be had; that the capital stock of said company shall be fifteen thousand dollars, to be divided into shares of twenty-five dollars a share."

Then follow the names and residences of about seventy-five subscribers, with the amounts by them respectively subscribed, aggregating upwards of $2,700, and among them is the defendant's subscription, as follows:

"Alexander Washer, Cotton township . . . . . $50"

In the case of *Fox* v. *The Allensville, Center Square and Vevay Turnpike Co.*, 46 Ind. 31, a complaint, substantially the same as the foregoing complaint, and exhibiting the same articles of association, was held good upon demurrer. And in *Atherton* v. *The Sugar Creek and Philadelphia Turnpike Co.*, 67 Ind. 334, it was held that from the time the articles of association of a turnpike company are filed in the recorder's office of the proper county, the association is to be deemed a corporation. The same ruling was made in *James* v. *The Greensboro, etc., Turnpike Co.*, 47 Ind. 379. It was held in *Steinmetz* v. *The*

Versailles and Osgood Turnpike Co., 57 Ind. 457, that an irregularity in the election of the directors of a turnpike company is no defence to an action by such company to collect stock subscribed to its preliminary articles of association; and, in the case above cited, 67 Ind. 334, it was held that the same rule applied to irregularities occurring after the election of directors, which are merely collateral to the direct proceedings necessary to enable the company to collect the stock subscribed to its preliminary articles. In *State, ex rel. The Monroe Gravel Road Co.*, v. *Stout*, 61 Ind. 143, it was said by this court, that, in a suit by a corporation, every fact necessary to the existence thereof need not be alleged, either generally or specifically. There was no error in overruling the demurrer to the complaint.

As to the second error assigned, the point made is that the court lost its jurisdiction by adjourning the court in a mode not authorized by the statutes.

The statutes in force at the time of said adjournment were the following:

"If any judge of the circuit court shall adjourn the court before having gone through the business pending, and before the expiration of the time fixed by law, the record must show the reason for adjournment." Practice Act, section 793.

"When the business pending in any of the courts of this State shall remain undisposed of at the close of any term of court, the judge may adjourn the court to any other time in vacation, of which notice shall be published in some newspaper of general circulation in the county, and at such adjourned time proceed with the business of the court, as a part of the regular term of said court at which the adjournment was ordered, and all parties, witnesses, jurors and officers shall attend as they were required to do at the regular term." Acts 1877, Reg. Sess., p. 28, section 1.

The 7th section of this last mentioned act repeals "all laws and parts of laws" inconsistent therewith; it repeals, therefore, the act of February 12th, 1855, 2 R. S. 1876, p. 14, which

provided that public notice of the adjournment should "be given in some manner, to be specified by said court;" but section 793 of the Practice Act, not being inconsistent with said act of 1877, is not repealed thereby. *Slaughter* v. *Gregory*, 16 Ind. 250.

The record shows that on the 6th day of November, 1878, the court entered upon its order book an order, reciting that the October term of court would expire by statutory limitation on the 9th day of November, 1878, leaving business pending, undisposed of for want of time, and declaring that "an adjourned term is hereby ordered and appointed to begin on Monday, November 11th, 1878, for the transaction and disposition of such business, undisposed of," and that "such adjourned term continue as part of this, the regular term."

The order further declared that all parties, witnesses, officers, and petit jurors, should attend said special term without further notice than as therein required, and that notice of the holding of said adjourned term should be given by publication of a copy of said order, certified under the hand and seal of the clerk of the court, in the *Vevay Reveille*, a weekly newspaper of general circulation, printed and published in said county of Switzerland, such publication to be made in the last issue of said newspaper, next before the time fixed for such adjourned term.

The record further shows that, on the said 9th day of November, another order of the court was entered in the order book, to wit: "The time allotted by law for the continuance of the present term of this court having expired, and there being business pending and undisposed of for want of time, court is now adjourned to the 11th day of November, 1878, at 9 o'clock A. M., at which time an adjourned term will be held, as provided for in an order made and entered of record, on the sixth day of the present month, providing for said adjournment, and pursuant to notice as therein provided, for the disposal of such unfinished business; court is now adjourned until Monday, November 11th, 1878, at 9 o'clock A. M."

The record further shows that, at the time thus appointed, the court met, and due proof was made of the publication of a duly certified copy of the said order of the 6th of November, 1878, in the issue of the said *Vevay Reveille*, on the 7th of November, 1878, and that afterwards, on said November 11th, 1878, the parties in this cause appeared, and a jury came, and there was a trial, without any objection to the jurisdiction.

We think the record shows a substantial compliance with the statutes, and that the court, at said adjourned term, had jurisdiction of the subject-matter and of the parties; the second assignment of error can not be sustained.

As to the motion for a new trial, it was founded on eleven alleged reasons:

1st. That the court admitted in evidence, over the objections of the appellant, a certified copy of a copy of the articles of association.

There was no available error in this. 1 R. S. 1876, p. 654, section 1, and p. 662, section 26. It was proved that after a copy of the original articles was filed in the recorder's office, the original articles were lost, and after diligent and proper search could not be found, and the person, who was recorder when the original articles were filed in his office, brought in the record book in which the articles were recorded, and stated that he recorded the copy filed with him, and then compared the record with the original, and found the record to be a correct and true copy, and said record was read in evidence; the lost articles of association were sufficiently proved.

The second reason for a new trial is, that the court admitted in evidence the record book of the company containing the notice of a call for an election of directors, and in admitting a printed notice of said call.

The third reason is, that the court erred in admitting in evidence that part of the record containing the oath and transactions of the board of directors, on pages 2, 3 and 33 of said record.

The fourth reason is, that the court erred in admitting in evidence the newspaper notice of the call for stock, and the testimony of Wm. J. Baird in connection therewith.

The fifth reason is, that the court erred in admitting the record of the articles of association; and reason five and a half is that the court erred in excluding the testimony of John P. White.

As to these objections, the law is that the books of a corporation are competent evidence for and against its members in an action between the corporation and its members. *Fox* v. *The Allensville, etc., T. P. Co.*, 46 Ind. 31, on p. 38.

The notice of the call was given for the proper length of time and was sufficiently proved, and was sufficient in substance. There was no error in admitting in evidence the record of the articles of association, and the record does not show that John P. White was offered as a witness and excluded.

The sixth reason for a new trial is, that "the court prevented the defendant from going to the jury on the question whether the defendant had sworn that he had subscribed, or authorized John P. Butts to subscribe, for the defendant, the sum of $50 payable in work and materials, or $50 with the privilege of paying it in work or materials, if the defendant obtained a contract thereon, or, if he did not, then to have the privilege of paying the same by work and material on the contract of somebody else, and the court announced that he had watched the testimony of the defendant, and that he had sworn to the latter state of facts, and that they amounted to an unconditional subscription, and declined to take up the time of the court in permitting the defendant's counsel to argue to the jury which state of facts the defendant, Washer, had sworn to, and gave the charge given in the record No. 1, of its own motion."

The bill of exceptions contains the testimony of the defendant, but contains nothing whatever in reference to any action of the court in refusing to permit the defendant's coun-

sel to go to the jury on the questions stated in said sixth reason for a new trial. Upon the sixth reason for a new trial, therefore, no question is presented for consideration. *Wood* v. *Crane*, 75 Ind. 207.

The other reasons for a new trial are:

7th. Error in giving to the jury instruction number one, of the court's own motion.

8th. Error in refusing to give to the jury instruction number one, asked for by the defendant.

9th. That the verdict is not sustained by sufficient evidence.

10th. That the verdict is contrary to law.

Instruction number one, given by the court of its own motion, is as follows:

"In this case you will find for the plaintiff and assess her damages at the amount of the subscription therein, with interest thereon from April 15th, 1872."

In *Dodge* v. *Gaylord*, 53 Ind. 365, this court cited with approbation the following language of the Supreme Court of Wisconsin: "The practice * * of directing a verdict in proper cases, when the evidence is all in, in favor of the party who may be entitled to it, seems never to have been questioned." *Cutler* v. *Hurlbut*, 29 Wis. 152. See also *Rudd* v. *Davis*, 3 Hill, 287. Upon the evidence given in the bill of exceptions, no other verdict than the one directed by the court could have been given. There was no error in said instruction. *Musselman* v. *Pratt*, 44 Ind. 126.

The instruction number one, asked for by the defendant, is as follows:

"The defendant asks the court to instruct the jury that the plaintiff can not recover in this case, unless the jury find, from the evidence, that the plaintiff located their said turnpike before the commencement of this action."

This instruction was properly refused; the road was sufficiently described in the articles of association; no other location was necessary.

The verdict was sustained by sufficient evidence and was

not contrary to law. There is no substantial error in the record. The judgment ought to affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellant.

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No. 6766.

COTTRELL ET AL. *v.* COTTRELL.

SPECIFIC PERFORMANCE.—*Contract for Sale of Land.—Complaint.—Title of Deceased Vendor.*—A complaint against the heirs of a deceased vendor, for a specific performance of his parol contract, need not allege that the ancestor had any title to the property which he agreed to convey.

EVIDENCE.—*Witnesses.—Heirs.—Statement of Party.*—On trial of an action against heirs, founded on a contract with the ancestor, to obtain title to real property, a party incompetent under section 499, R. S. 1881, to testify, can not call from a witness his own statements of fact made to the witness before and during examination.

SAME.—What may not be given in evidence directly, can not be given indirectly.

SAME.—A party who is an incompetent witness to give in evidence a conversation with a deceased person, can not give it in evidence as rehearsed by him to another.

PRACTICE.—*Separation of Witnesses.—Parties.—Guardian.*—The guardian of a minor defendant is within the rule that a party, although a witness, may not be excluded from the court room, under an order for the separation of witnesses.

From the Parke Circuit Court.

R. Dunnigan, W. Mack, J. M. Allen and *S. C. Davis*, for appellants.

A. B. Carlton and *J. E. Lamb*, for appellee.

ELLIOTT, C. J.—The complaint of the appellee is against the children and heirs of Joshua Cottrell, deceased, and seeks to enforce the specific performance of a parol contract made with the deceased in his lifetime.

The complaint is badly drawn, but we think states a cause of action. The principal objection urged against it is that the first paragraph does not allege that the ancestor of appellants had any title to the property which it is alleged he agreed to convey, and is, therefore, bad. There are facts stated which show some title in the decedent. It certainly appears that his title was sufficient to put and keep the appellee in possession of the land for many years. If the appellee is content with such title as a conveyance from the heirs of the deceased vendor will convey, the appellants should not be allowed to prevent him from securing it. The ancestor had bargained away all the title he had, and, whether that was much or little, the appellee's contract vested in him a right to have that for which he had contracted. It can not be of importance to appellants whether that title was perfect or imperfect, for the appellee has a right to it, whatever its character may be. If he is satisfied, they can not complain, for it never descended to them, but had vested in the appellee prior to the death of their ancestor.

The appellee called as a witness one of the defendants, Isaac Cottrell, and, in a long and involved interrogatory, stated a conversation in which the witness was given, by the appellee, a history of his claim, and asked if such a conversation did not take place. In permitting this question to be asked and answered, the court committed an error. The appellee, under the statute in force at the time of the trial, was not a competent witness, for the action was upon a contract made with the deceased ancestor of the heirs against whom the action was instituted. It is settled that in such cases the plaintiff is not competent to testify as to matters which occurred prior to the death of the ancestor. *Wiseman* v. *Wiseman*, 73 Ind. 112. Such a method as that adopted would enable a party to get before a jury his own statement of a transaction with the deceased person. A party prohibited from testifying can not secure the benefit of his version of such a transaction in this manner. To permit such a practice would make it easy to

evade a wise law, and would encourage the manufacturing of testimony. If courts were to tolerate such a practice, it would send to the jury the statement of a party without the restraint imposed by an oath. It would be far more likely to result in evil than to permit the party to speak to the jury from the witness stand. In the one case it would be sworn testimony, in the other not. What may not be done directly, can not be accomplished by indirection. *Clift* v. *Shockley*, 77 Ind. 297. Suppose, for the sake of illustration, that John Doe has a claim against the estate of Richard Roe, deceased, and that he goes to the administrator, or to any other person, and, in detail, states the nature of his contract. Could the claimant, in such a case, prove his own declarations for the purpose of establishing his claim? If he could, then all any claimant need do is to pour into the ear of some one his unsworn account of a transaction, and thus make good his claim.

The appellee was permitted to testify as to the statements made by him to the witness, Isaac Cottrell. This was error. A party can not, by the rehearsal of a transaction with a deceased person, place himself in a situation entitling him to testify as to what he said to another about such transaction.

The rule allowing a party, in an action against heirs, upon a contract with their ancestor, to testify as to matters occurring subsequent to the ancestor's death, does not permit him to recite his version of an alleged contract with the deceased, and thus get it before the jury.

John Dayton was the guardian of one of the minor appellants, and as such was in attendance at court. A motion was made to separate witnesses, and the court excluded Dayton from the court room, because he was a witness. This ruling was erroneous. In *Larue* v. *Russell*, 26 Ind. 386, it was said of the exclusion of a party: "This proceeding is probably without a precedent. The right of a party litigant to be present during the trial of his cause, that he may be heard in his own behalf, has been so long accorded by universal custom, and is so obviously necessary for the security of private rights, that

the refusal to entertain the cause at all would scarcely be a greater error than the denial of this privilege. Besides, it is secured by plain and positive statute."

The fact that the party acts in a representative capacity does not make any difference. The guardian is bound to maintain the interests of his ward quite as earnestly and carefully as if they were his own, and his presence in court is as important as if the case were against him individually.

Other questions are discussed, but, as the judgment must be reversed for the reasons stated, we deem it unnecessary to consider them.

Judgment reversed.

No. 9109.

Leary et al. v. Smith et al.

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Marion Superior Court.—*Special and General Term.—Appeal to Supreme Court.—Assignment of Errors.*—An appeal will not lie to the Supreme Court from a judgment of the Marion Superior Court at special term, but only from the judgment of that court in general term. Therefore, in such a case, the only proper assignment of error, on appeal to the Supreme Court, is that the superior court, in general term, had erred in affirming or reversing, as the case might be, the judgment of the court at special term.

From the Marion Superior Court.

J. B. Julian and *J. F. Julian*, for appellants.

J. E. McDonald, J. M. Butler, G. C. Butler, F. B. McDonald, R. W. Harrison and *B. S. Higgins*, for appellees.

Howk, J.—In this case, the appellants, the defendants below, have appealed to this court from the judgment of the Marion Superior Court, in general term, and have endorsed upon the record the following assignment of errors:

"The appellants, by counsel, come and say that the court below erred in this cause, as shown by the within record:

"1st. In overruling appellants' motion to set aside default and publication of notice, in the Boone Circuit Court.

"2d. In overruling appellants' motion to set aside default and publication of notice in the Marion Superior Court.

"3d. In refusing Honora Leary a change of venue from the Marion Superior Court, and from the judge.

"4th. In refusing to grant a new trial of the cause."

It will be observed, that not one of these supposed errors is based upon the action or decision of the court, in general term. In appeals to this court from the Marion Superior Court, it has been uniformly held, that the only proper assignment of error here is, that the court, in general term, had erred in its decision in affirming or reversing, as the case might be, the judgment of the court at special term. Such an assignment of error will bring before this court the errors assigned in the court below, in general term, and none other; and, without such an assignment of error here, no question will be presented for the decision of this court. *Wesley* v. *Milford*, 41 Ind. 413; *Cline* v. *Love*, 47 Ind. 258; *Coffin* v. *Campbell*, 68 Ind. 452; *Beineke* v. *Wurgler*, 77 Ind. 468.

The obvious reason for these decisions is, that the statute, under which the Marion Superior Court is organized, does not provide for any appeal from any order or judgment of the court, at special term, directly to this court; but, in section 27 of the statute, it is provided that "Any party may appeal to the Supreme Court from the order or judgment of general term," etc. 2 R. S. 1876, p. 27; section 401, Civil Code of 1881; section 1362, R. S. 1881.

We find no available error in the record of this cause.

The judgment is affirmed, with costs.

No. 8472.

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Bolin et al. v. Simmons.

Assignment of Error.—*Practice.*—*Demurrer.*—Where the record shows the sustaining of demurrers to different answers, an assignment that the court erred in sustaining the demurrer to the answer is too indefinite. The particular answer intended should be designated.

Same.—*New Trial.*—Causes for a new trial can not be assigned as error. The proper assignment is upon the overruling of the motion for a new trial.

From the Hancock Circuit Court.

R. D. Logan and *A. A. Falkenburg*, for appellants.

Woods, J.—Appeal from a decree of foreclosure of a mortgage upon real estate. The appellee has filed no brief. The appellants have assigned the following errors:

1st. The finding is contrary to law.

2d. The finding is contrary to the evidence.

3d. The court assessed the damages too high.

4th. The court erred in overruling the demurrer to the complaint.

5th. The court erred in sustaining the demurrer of the plaintiff to the defendants' answer.

The complaint is unquestionably good. Demurrers were sustained to more than one answer, and to other answers were overruled. It is, therefore, impossible to know to what answer the 5th specification of error refers. Besides the appellants' brief is silent in reference to the rulings on demurrer.

The first, second and third specifications are proper causes for a new trial, but are not proper specifications in an assignment of errors. The proper assignment would have been that the court erred in overruling the motion of the appellants for a new trial. This has been often decided.

Judgment affirmed, with costs.

Petition for a rehearing overruled.

No. 10,085.

Pancake *v.* The State.

Intoxicating Liquor.—*Beer.—Selling on Sunday.—Evidence.*—On trial of an indictment for selling liquor on Sunday, evidence, to wit: "Am sure it was on Sunday. Mr. K. got a glass of beer for himself and one for me. Defendant handed us the liquor; K. paid for it five cents a glass; beer is an intoxicating liquor," shows that the beer so sold was an intoxicating liquor, and is sufficient to sustain a conviction.

Same.—*Instruction.—Assuming Fact.—Jury.*—On such trial, it was error to instruct the jury: "It would be a legitimate inference for you to draw that the witness, in saying beer was intoxicating, had reference to the beer spoken of by him when he said he had purchased beer of the defendant." The inference from the facts is a question for the jury, and not a matter of law for the court.

Same.—*Construing Evidence.—Practice.*—Upon a motion for a new trial, challenging the sufficiency of the evidence, a court is authorized to give a construction to the testimony of witnesses which it may not do when giving the cause to the jury.

Same.—If the evidence show that liquor was sold on some Sunday within two years prior to the return of the indictment, it need not fix the precise Sunday within that time.

From the Bartholomew Circuit Court.

G. W. Cooper, for appellant.

D. P. Baldwin, Attorney General, *W. W. Thornton* and *W. Dixon*, Prosecuting Attorney, for the State.

Niblack, J.—On the 19th day of December, 1881, an indictment was returned against Frank Pancake, the appellant, for selling intoxicating liquor, in a less quantity than a quart, to one Charles Knowlton, on the 28th day of August, 1881, being the first day of the week, commonly called Sunday.

A jury returned a verdict of guilty as charged, assessing a fine of ten dollars against the appellant, and, first refusing to grant a new trial, the court rendered judgment upon the verdict.

Questions are made here upon the sufficiency of the evidence to sustain the verdict, and upon certain instructions given to the jury.

One Parley Dixon testified: "I know the defendant Pancake, and Charles Knowlton, named in the indictment. The defendant was keeping a saloon in the latter part of the year 1881. I saw Charles Knowlton purchase some beer of the defendant in the latter part of the year 1881. It was just after the fair of the Bartholomew Agricultural Society of that year. * * * * * * It was either the first or second Sunday after the fair. It was on Sunday. Am sure it was on Sunday. Mr. Knowlton got a glass of beer for himself and one for me. Defendant handed us the liquor. Knowlton paid for it five cents a glass. Beer is an intoxicating liquor. * * * * * * * It was in Bartholomew county, State of Indiana, that what I have stated relating to Charles Knowlton's purchase of beer from defendant took place."

One George Buxton testified, that the fair of the Bartholomew Agricultural Society, for the year 1881, commenced on the 29th day of August of that year, and continued until the next Saturday, the 2d day of September. And this was substantially all the evidence given in the cause.

It is most earnestly contended that the evidence set out as above did not either show, or fairly tend to show, that the beer sold by the appellant to Knowlton was an intoxicating liquor, and that hence the verdict was not sustained by the evidence.

Having reference, however, to the connection in which the witness, Dixon, stated that beer was an intoxicating liquor, we are of the opinion that he intended to be understood as saying, and that the fair inference from all he said on that subject was, that the beer, concerning which he was testifying as having been sold by the appellant, was an intoxicating liquor.

Taking several of the instructions together, the court said, in substance, to the jury, that proof of the precise time at which the intoxicating liquor was sold was immaterial, provided it was shown to have been sold within two years prior

to the 19th day of December, 1881, and on some Sunday within that time.

There was no error in so instructing the jury. Moore's Criminal Law, section 367; *Buckner* v. *The State*, 56 Ind. 207.

The authorities cited by the appellant have reference to the necessity of charging some definite time in the indictment, and not to the proof which is required as to the time of the commission of the offence.

The last instruction given by the court, known as No. 15, was as follows:

"If it appears from the evidence that a witness testified that he bought beer of the defendant, and he is asked if beer is intoxicating, and he says it is, and you find that no different kind of beer has been mentioned or spoken of by the witness or others during his examination, then, in such an event, it would be a legitimate inference for you to draw that the witness, in saying beer was intoxicating, had reference to the beer spoken of by him when he said he had purchased beer of the defendant."

It is objected to this instruction that it assumed to give an unauthorized construction to the evidence, and thus invaded the province of the jury. That objection is well founded and must be permitted to prevail. What was, and what was not, a legitimate inference from the hypothetical facts enumerated in the instruction, was a question of fact for the jury, and not a matter of law for the decision of the court. The instruction can not, therefore, be sustained.

Upon a motion for a new trial challenging the sufficiency of the evidence, a court is authorized to give a construction to the testimony of witnesses which it may not do when giving the cause to the jury.

The judgment is reversed, and the cause remanded for a new trial.

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No. 8421.

The Ætna Insurance Company v. Kittles et al.

Fire Insurance.—*Pleading.—Condition Precedent.—"Fulfilled" and "Performed" Equivalent.*—The allegation in a complaint, in an action upon an insurance policy, that "the plaintiffs duly fulfilled all the conditions of said agreement and insurance on their part," is sufficient. The word "fulfilled" is equivalent to the word "performed," as used in section 84 of the code, R. S. 1881, section 370.

Same.—*Notice, Proof and Demand.*—In such case, a further allegation of due notice and proof of loss, and demand of payment, constitutes no part of the general allegation of performance, but only shows that an action had accrued.

Same.—*Insurable Interest at Time of Loss.—Complaint.*—A complaint on a policy of insurance must show that the plaintiff had an insurable interest at the time of the loss.

Same.—*Repayment of Premium.—Cancellation of Policy.—Answer.*—Repayment of unearned premium and a cancellation of the policy constitute a good defence to a complaint on an assigned policy of insurance by the assured.

Pleading.—*Joint Complaint.*—The complaint of two or more persons must show a right of action in both.

Same.—*Bad Answer to Bad Complaint.*—A bad answer is good enough for a bad complaint.

Practice.—*Demurrer Carried Back.*—A demurrer to an answer should be carried back and sustained to a bad complaint.

From the Posey Circuit Court.

W. H. DeWolf, S. N. Chambers and *W. Loudon*, for appellant.

A. P. Hovey, G. V. Menzies and *E. M. Spencer*, for appellees.

Franklin, C.—This is an action by appellees against appellant upon a policy of insurance upon a dwelling-house, against fire, in the sum of $1,500. A demurrer was overruled to the complaint, and a demurrer was sustained to the second, third, fourth and sixth paragraphs of the answer, to which rulings exceptions were reserved. Trial by court, finding for appellees, and, over a motion for a new trial, judgment was rendered for appellees for $1,000.

The following alleged errors have been assigned in this court:

1st. Overruling the demurrer to the complaint.

2d. Sustaining the demurrer to the second, third and fourth paragraphs of the answer.

3d. Sustaining the demurrer to the sixth paragraph of the answer.

4th. Striking out petition for stay of proceedings.

5th. Overruling motion for a new trial.

6th. Overruling motion in arrest of judgment.

The first objection to the complaint is that it does not allege the performance of the conditions precedent, in the policy, to the bringing of the suit.

The policy is made a part of the complaint, and the following averments are made in relation to the performance of the conditions: "That plaintiffs duly fulfilled all the conditions of said agreement and insurance on their part, and sixty days before the bringing of this suit, to wit, on the 25th day of June, 1879, gave defendant due notice and proof of said loss, and demanded payment of said loss of $1,500."

Section 84 of the code reads: "In pleading the performance of a condition precedent in a contract, it shall be sufficient to allege, generally, that the party performed all the conditions on his part; if the allegation be denied, the facts showing the performance must be proved on the trial."

But it is insisted that the use of the word "fulfilled," in this complaint, is not equivalent to the word "performed" in the statute. Webster defines the word "fulfill," in part, to mean to perform what has been promised, commanded or intended; to accomplish; to effect; to complete; to effectuate; to execute. Hence, the word "fulfilled," as used in this complaint, means fully performed, and is equally as strong and emphatic as if the word "performed" had been used. In this particular, the complaint in this case differs very widely from that in the case of *The Home Insurance Co. of New York* v. *Duke*, 43 Ind.

418. In that case, there was no general averment of performance, or anything like it. But there was an attempt to allege specific performance of the conditions precedent, and, only having averred performance of a part of them, and that part imperfectly, the complaint was held bad. And, in that case, it was held that it was not necessary to resort to the common-law practice of making specific averments of performance; that if the general allegation in accordance with the statute had been made, it would have been sufficient. See, also, *Mason* v. *Seitz*, 36 Ind. 516.

We think the word "fulfilled," as used in this complaint, is near enough synonymous with the word "performed," to hold that its use was a sufficient compliance with the statutory provision for pleading, generally, the performance of conditions precedent. *Richardson* v. *North Missouri Ins. Co.*, 57 Mo. 413; *Ferrer* v. *Home Mutual Ins. Co.*, 47 Cal. 416.

It is further insisted that because the plaintiffs further averred that due notice and proof of said loss had been given to the defendant, it was therefore necessary for them to go on, and specifically aver performance of each of the conditions. We do not think so. The general averment was good without this specification. It constituted no part of the general averment of performance. It only showed that a right of action had accrued.

Another objection to this complaint is, that it does not show any insurable interest of appellee Edwards in the insured property at the time of its loss by fire.

The complaint, in order to be good, must show that fact, or some subsequently acquired interest in the policy.

Appellee Kittles owned the property insured; he had mortgaged it to said Edwards as trustee, to secure a loan from the Equitable Trust Company, of New London, Connecticut, and, on the same day of the execution of the policy to Kittles, appellant's agent executed the following writing: "Whereas the property described in this policy has been conveyed to Jonathan Edwards in trust to secure the payment of a certain

indebtedness to the Equitable Trust Company, of New London, Connecticut, or its assignees, therefore the loss, if any, is made payable to said Jonathan Edwards, trustee, or his successor in trust, as his interest may appear. Now it is agreed that the said trustee or his successor in trust may, at any time, waive in writing his right to recover the amount of loss, if any, under this policy, in which event it shall be paid to said assured or owner of said premises under the provisions of this policy. In testimony that the foregoing provisions are made a part of policy No. 339 of the Ætna Insurance Company, of Hartford, Connecticut, to which they are attached, witness my hand this eighth day of March, 1877.

"WALTER L. SULLIVAN, Agent."

The complaint avers that on the day of the execution of the policy, said "Kittles, by and with the consent of defendant, assigned and transferred said policy to plaintiff Jonathan Edwards, trustee, for the use and benefit of the said Equitable Trust Company." And makes the foregoing a part of the complaint as an exhibit.

This is not an assignment by Kittles; it is executed only by appellant's agent, and, being made a part of the complaint, is to control the allegation in the complaint. And this writing attached to the policy, agreeing to pay the loss, if any, as Edwards' interest may appear, makes it necessary that his interest in the loss should appear in the complaint. There is no other averment in the complaint in relation to Edwards' interest in the property insured or the loss. It was about one year and ten months after the execution of the policy when the property was burned. And there is nothing in the complaint showing when Edwards' mortgage matured, or that it had not been fully paid off before the burning of the property.

There is an averment in the complaint, that, after the insured house was burned, it was rebuilt, and was of as great value as the insured one immediately before the burning. And if Edwards still held any claim by virtue of his mortgage, at the time of the burning, when this suit was commenced, his

security for its payment was not in the least diminished by the burning. It is not claimed that Edwards acquired any interest in the policy after the loss.

The complaint is joint, and a right of action must appear in both the plaintiffs, or it will be held bad on demurrer.

The averments of the complaint do not show any insurable interest of Edwards in the insured property at the time of its loss, and therefore the demurrer to the complaint should have been sustained. *The Home Ins. Co.* v. *Duke*, 75 Ind. 535; *The Aurora Fire Ins. Co.* v. *Johnson*, 46 Ind. 315.

And for the same reasons the demurrer to the 3d paragraph of the appellant's answer should have been overruled. That paragraph averred that on the 18th day of February, 1879, long before the burning of the building insured, the defendant, at the request of the plaintiff Kittles, cancelled said policy of insurance, and then and there paid to him the sum of thirteen dollars, that sum being the ratable proportion of the premium for the unexpired term of said policy, which sum of money was then and there received and accepted by said plaintiff. This was a sufficient answer to the complaint, which did not show a right of action except in Kittles. And if it did not answer the complaint as to Edwards, it was good enough. A bad answer is good enough for a bad complaint. The demurrer should have been sustained to the complaint instead of to the answer.

It is unnecessary to decide the other errors assigned, as they may not again arise in a subsequent trial. For the error in overruling the demurrer to the complaint the judgment ought to be reversed.

Per Curiam.—It is therefore ordered, upon the foregoing opinion, that the judgment below be and the same is in all things reversed, at appellees' costs, and that the cause be remanded, with instructions to the court below to sustain the demurrer to the complaint, grant the plaintiffs leave to amend, if desired, and for further proceedings.

No. 9451.

The Second National Bank of Richmond v. Hutton.

Justice of the Peace.—*Jurisdiction.—Civil Action.—Amount in Controversy.*—The jurisdiction of a justice of the peace, in civil suits founded on contract or tort, under section 1433, R. S. 1881, is limited to the amount of two hundred dollars.

Same.—*Complaint.—Bill of Particulars.*—Where a bill of particulars, filed with the complaint, shows that the plaintiff's claim or cause of action does not exceed the sum of two hundred dollars, the justice will have jurisdiction of the case, even though the prayer of the complaint is for a sum in excess of two hundred dollars; for, in such case, the amount in controversy can not exceed the amount of the demand as stated in the bill of particulars.

Same.—*Appeal from Justice.—Jurisdiction of Circuit Court.*—If the justice of the peace have jurisdiction of a cause, on appeal from such justice, the circuit court will also have jurisdiction of such cause.

From the Wayne Circuit Court.

W. A. Bickle, for appellant.

W. D. Foulke and *J. L. Rupe*, for appellee.

Howk, J.—This suit was commenced by the appellant against the appellee, before a justice of the peace of Wayne county. The cause was tried by a jury, before the justice, resulting in a verdict for the appellant in the sum of $195.77, and judgment was rendered accordingly. From this judgment the appellee, Hutton, appealed to the circuit court of the county. In that court, the appellee Hutton filed his written motion to dismiss the action; which motion was sustained by the court, and judgment was rendered against the appellant for the appellee's costs.

In this court, the appellant has assigned, as errors, the following decisions of the circuit court:

1. In sustaining appellee's motion to dismiss, and in dismissing, this action for the want of jurisdiction thereof in the justice of the peace; and,

2. In sustaining appellee's motion to dismiss, and in dis-

missing, this action for the want of jurisdiction thereof in the circuit court.

In his written motion to dismiss this action, the appellee Hutton assigned the following causes therefor:

1. "For the reason, that it appeared upon the transcript certified by the justice, and upon the face of the complaint filed herein, that the justice, John S. Lyle, before whom this case was tried, had no jurisdiction of this suit, for the reason that the amount claimed in the complaint exceeds the sum of $200;" and,

2. "For the further reason, that it appears that this court, upon appeal from the said John S. Lyle, has no jurisdiction of this action, for the reason that the complaint in suit demands judgment for a sum exceeding $200."

If the first of these two causes for the dismissal of this action is well assigned, it is manifest that the second cause for such dismissal must also be well assigned. For if it can be correctly said that the justice of the peace had no jurisdiction of this action, then it must follow, we think, that the circuit court did not, and could not, by means of the appeal from the judgment of the justice, acquire jurisdiction of such action. In its complaint, the appellant alleged, in substance, that on the 10th day of May, 1880, the appellee became and was indebted to the appellant in the sum of $200, for money had and received by him of Lee M. Richey, for the appellant's use, and in the further sum of $200, for so much money had and received by him for the appellant's use, and in the further sum of $200, for money collected by him as the property of appellant, and in the further sum of $200, for money had and received by him, being dividend due appellant on the estate of Burtch, Knox & Co., and which appellee appropriated to his own use, all of which he promised to pay, but failed and refused to pay.

The prayer of this complaint was as follows: "Wherefore plaintiff claims judgment, by reason of all the foregoing mat-

ters alleged herein, in the sum of two hundred dollars, and interest and costs."

In section 10 of the act of June 9th, 1852, defining the jurisdiction of justices of the peace in civil cases, as amended by an act approved March 11th, 1861, it is provided as follows: "Justices of the peace shall have jurisdiction to try and determine suits founded on contracts or tort, where the debt or damage claimed or the value of the property sought to be recovered does not exceed one hundred dollars, and concurrent jurisdiction to the amount of two hundred dollars," etc. 2 R. S. 1876, p. 605; section 1433, R. S. 1881.

It is well settled by the decisions of this court, that justices of the peace have only such special and limited jurisdiction, in the trial of civil causes, as may have been conferred upon them by statute. *Gregg* v. *Wooden*, 7 Ind. 499; *Willey* v. *Strickland*, 8 Ind. 453; *The Ohio, etc., R. R. Co.* v. *Hanna*, 16 Ind. 391; *Caffrey* v. *Dudgeon*, 38 Ind. 512; *Horton* v. *Sawyer*, 59 Ind. 587; *The State, ex rel. Conn*, v. *Forry*, 64 Ind. 260. Ordinarily, no doubt, in a civil action before a justice of the peace, if the amount for which judgment is demanded, in the prayer of the complaint, exceed the sum of two hundred dollars, the justice will have no jurisdiction of the action. This is the general rule in such cases, and it would seem that the court below acted upon this rule, in sustaining the appellee's motion for the dismissal of this action. Like other general rules, this one, however, has its exceptions. If it appeared in this case, as we think it did, from the entire cause of action filed with the justice, that the appellant's demand, notwithstanding the prayer of its complaint, was expressly limited to the sum of $195, so that it could not lawfully recover one cent even in excess of that sum, then it is clear that the justice had jurisdiction of this action, and that the appellee's motion to dismiss the suit ought to have been overruled.

In its complaint, as will be seen from our summary thereof, the appellant declared against the appellee on the common

counts. With its complaint, however, the appellant filed with the justice a bill of particulars, in the words and figures following, to wit:

"The plaintiff in this action, on the common counts, files the following bill of particulars: The plaintiff held a claim on the estate of Burtch, Knox & Co., of Preble county, Ohio, assigned to it by Leander Marshal, being dividend on about $3,300, Lee M. Richey and others being assignees. A dividend was declared in favor of plaintiff's claim, of $195, and defendant collected and appropriated the same to his own use, and the plaintiff claims the $195."

The office of a bill of particulars, in such a case as this, is to make the plaintiff's precise cause of action more certain, definite and specific, than the same has been stated in the common counts. In such a case, without regard to what may have been stated in general terms in the complaint, the plaintiff's evidence and right of recovery are limited, under the law, strictly and precisely, to the exact claim or cause of action shown or set forth in the bill of particulars. Possibly, the plaintiff may recover less, but in no event more, than the amount of the demand as stated in the bill of particulars. In *Mitchell* v. *Smith*, 24 Ind. 252, the cause of action filed with the justice was in the form of an account, which was footed to be $200, though the correct aggregate of the items was $200.75. This account was thus endorsed: "Demand, $176.75." The jurisdiction of the justice to try the cause being under consideration, in the opinion of the court, FRAZER, J., said: "The amount footed on the account, as filed with the justice, ought, we think, to be taken as the amount for which judgment was demanded, in the absence of any other statement of the demand. If this be correct, it is unnecessary to determine whether the demand on the back of the paper ought to be regarded as a part of the complaint, though the indulgence which has always been extended to pleadings in justices' courts, in this State, would, doubtless, justify us in so regarding it. Either of these propositions settles the question against the appellant."

If, in such a case, the endorsement on the cause of action ought to be regarded as a part thereof, for the purpose of determining whether or not the amount of the demand is within the jurisdiction of the justice, surely, the bill of particulars filed with the complaint ought to be considered as a controlling part thereof, for the purpose of determining the same question. In the case now before us, the appellant's demand was limited by its bill of particulars to the precise sum of $195; and, this being so, we are of the opinion that the cause of action was within the jurisdiction of the justice, and, of course, of the court below on the appeal thereto from the justice. It follows, therefore, that the court erred in sustaining the appellee's motion for the dismissal of this action, for either or both of the causes assigned therein.

The judgment is reversed, at the appellee's costs, and the cause is remanded, with instructions to overrule the motion to dismiss the action, and for further proceedings not inconsistent with this opinion.

No. 9694.

The Louisville, New Albany and Chicago Railroad Co. v. Wunderlich.

Supreme Court.—*Exception.*—*Harmless Ruling.*—Where an exception was sustained but not insisted upon in the trial court, and the party secured all the right he was entitled to, this irregularity is not sufficient ground for reversal.

Same.—*Evidence.*—*New Trial.*—A party complaining of the admission of evidence must state his objections to the trial court, and except to the rulings adverse to him; and if he desires to present a question thereon in the Supreme Court, he must assign such rulings as cause for a new trial, and point out with reasonable certainty the evidence complained of.

From the Floyd Circuit Court.

A. Dowling, for appellant.

S. K. Wolfe and *J. V. Kelso*, for appellee.

The Louisville, New Albany and Chicago Railroad Co. v. Wunderlich.

ELLIOTT, C. J.—This was a proceeding by the appellant under the statute authorizing the seizure and condemnation of lands for railroad purposes.

An exception was filed by the appellee, alleging that the appraisers were not appointed by the court in session, nor by the judge in vacation. The appellant moved to strike out this exception; this motion was overruled. We do not find it necessary to consider or decide the question presented by this ruling, for the record shows that the appellant was not injured by it. The exception was not insisted upon, and the question at issue between the parties as to the value of the land seized was submitted to a jury. No harm resulted, and there is nothing of which to complain. The utmost that the appellant could have obtained if the motion to strike out had prevailed, it did secure. If, on the contrary, the exception had been sustained, the appellant would have been defeated. All that the appellant could, by any possibility, have been entitled to, was awarded, namely, a trial of the question of the value of the land appropriated. Where a party secures all the right to which he is entitled, a mere irregularity will not be sufficient ground for reversal.

It is argued that the court erred in admitting evidence. There are two unanswerable reasons why this argument can not prevail: First. A party complaining of the admission of evidence must state his objections to the trial court, and except to the rulings adverse to him. The appellant neither stated objections, nor reserved exceptions. Second. Where a party desires to present a question upon a ruling admitting evidence, he must assign such ruling as a cause for a new trial, and point out, with reasonable certainty, the evidence alleged to have been erroneously admitted. The admission of evidence is not assigned as a cause for a new trial.

We can not disturb the verdict, upon the ground that the jury awarded the appellee a greater sum than he was entitled to recover. There is much conflict in the evidence as to the value of the land seized, but there is evidence fully sustain-

ing the conclusion reached by the jury. The question of value was one peculiarly and exclusively for the consideration of the jury, and it would violate settled rules to interfere with their verdict.

Judgment affirmed.

No. 9199.

Richardson v. Brewer.

Trespass.—*Complaint.*—*Close.*—A complaint in trespass, alleging that "the defendant unlawfully broke and entered the *close* of the plaintiff, situate" in the county and State, "and took and carried away therefrom two hundred dozen sheaves of wheat, the personal property of the plaintiff, without license so to do, to the damage," etc., is sufficient.

Same.—*Personal Property.*—*Nominal Damages.*—The unlawful removal of the personal property of another is an injury for which the law gives an action, and from which it implies nominal damages.

From the Grant Circuit Court.

J. L. Custer, for appellant.

H. Brownlee, for appellee.

Morris, C.—This is an action of trespass commenced by the appellee against the appellant before a justice of the peace. The complaint is as follows:

"Martha Brewer, plaintiff, complains of Hagan Richardson, defendant, and says, that on the 3d and 5th days of July, 1880, the defendant unlawfully broke and entered the close of the plaintiff, situate in the county of Grant and State of Indiana, and took and carried away therefrom two hundred dozen sheaves of wheat, the personal property of the plaintiff, without license so to do, to the damage of the plaintiff one hundred and fifty dollars."

A trial was had before the justice, which resulted in a judg-

ment in favor of the appellee. The appellant appealed to the circuit court. In the circuit court the appellant moved the court in writing to dismiss the action for the following reasons:

1. Because the complaint does not state facts sufficient to constitute a cause of action.

2. Because the complaint does not describe the close alleged to have been broken.

3. The complaint does not show whether the action is for trespass to personal or real property.

4. Because the complaint does not show facts sufficient to bar another action.

The motion was overruled. It is made a part of the record by bill of exceptions.

A trial was had in the circuit court, which also resulted in a judgment for the appellee. A motion for a new trial was overruled. The evidence is not in the record.

The errors assigned are the overruling of the motion to dismiss the action and the overruling of the motion for a new trial.

The only question discussed is the overruling of the motion to dismiss the action. The appellant insists that the motion to dismiss the action operated as a demurrer to the complaint, and that, as the complaint does not state facts sufficient to constitute a cause of action, the motion should have been sustained. The appellant also contends that it is impossible to determine whether the complaint alleges an injury to real estate or to personal property.

We think the complaint clearly charges an injury to personal property. It avers that the appellant, without leave, unlawfully took and carried away from the appellee's close two hundred dozen sheaves of wheat, the personal property of the appellee. The word "close" signifies an interest in the soil, and the charge that the appellant took the sheaves of wheat from the appellee's close is equivalent to saying that they were taken from her land in Grant County, Indiana. It was not

necessary to describe the close more particularly. The sheaves of wheat are averred to be the property of the appellee, and to have been taken and carried away, without leave, by the appellant. This was a sufficient description of the property, and of the appellee's right to the possession of it. *Gronour* v. *Daniels*, 7 Blackf. 108.

The injury complained of is the removal of the wheat. The unlawful removal of the personal property of another is an injury for which the law gives an action and from which it implies nominal damages at least.

"If a trespass is committed, that is, if a right is invaded or interfered with, although without any actual damage resulting, the person to whom the right belongs may maintain an action and recover nominal damages." 1 Sedgwick Damages, p. 88, note (b), 7th ed.

There was no error in overruling the motion to dismiss the action. This is the only question in the case. The judgment should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

No. 8719.

GOODWINE ET AL. v. THE STATE, EX REL. FLEMING.

TOWNSHIP TRUSTEE.—*Successive Bonds.—Liability of Sureties.— Estoppel.*—The sureties upon a township trustee's official bond are not liable for defalcations which occurred before the bond was given, and are not estopped by the acts, book entries, or reports of the trustee, from showing when a defalcation in fact occurred.

SAME.—The condition of a township trustee's bond embraces "all moneys belonging to the township," and therefore includes money received from his predecessor in office.

SAME.—*Defalcation.—Use of Township Funds.*—A township trustee is not a defaulter because he invests in his private business money received from

public sources, so long as he continues ready to pay out all sums required for public uses, and at the proper time is ready to pay over to his successor the remainder for which he may then be accountable.

SAME.—*Failure to Pay Over to Successor.*—The failure of a township trustee to pay over to his successor the sum for which he is accountable, though he be his own successor, is a defalcation, for which the sureties upon his first bond are responsible; but if, after entering upon his second term, he make the defalcation good by paying the amount thereof to himself as trustee, he then, with his sureties, becomes liable therefor upon his new bond.

From the Warren Circuit Court.

J. McCabe, for appellants.

W. P. Rhodes and *A. R. Owen*, for appellee.

WOODS, J.—This appeal is from a judgment in favor of the appellee against the appellants, upon the official bond of Joseph M. Thomas, as trustee of Jordan township, in Warren county, the appellants Goodwine and Pence being charged as the sureties upon the bond; and the relator being the successor of Thomas, as trustee of the township. Thomas has formally declined to join in the appeal of his co-defendants, at whose request the court found the facts specially, and stated a conclusion of law in favor of the appellee, to which they saved an exception.

The facts stated in the finding of the court are substantially as follows:

1. Joseph M. Thomas was elected trustee of Jordan township, Warren county, Indiana, in October, 1872, was re-elected in October, 1874, and again re-elected in October, 1876, his last official term expiring in April, 1878, when Thomas C. Fleming, the relator, was elected his successor in the trust, and still holds the office.

2. Thomas, as such trustee, on the 19th day of October, 1876, duly executed his official bond in the penalty of $5,000, with his co-defendants as sureties, which bond was duly accepted and approved, as alleged in the complaint, and is the bond in suit.

3. On the 15th day of October, 1876, Thomas filed with

the auditor his annual report to the board of commissioners, showing that there remained in his hands of the funds of the township the aggregate sum of $2,246.41. This sum had been converted by Thomas to his own use, and was invested in cattle and stock, which he then had upon his farm. Said report was intended to, and did, close his official doings for the term immediately preceding the one in which the bond sued on was executed.

4. After he had executed the bond in suit, and had entered upon his last official term, there came to his hands, of the funds of the township, the aggregate sum of $5,248.40, which was received upon warrants drawn by the county auditor on the county treasurer. During the same time he received the further sum of $2,400, which he realized from the sale of his cattle and stock aforesaid, and which sale he made for the purpose of raising money to reimburse the township for the moneys converted as aforesaid, and the latter sum of $2,400 he used and applied for this purpose, paying it out for township purposes during his last year in office. After entering upon his last official term he expended for township purposes the sum of $6,617.62.

5. On the 8th day of April, 1878, at the close of his term of office, he filed with the county auditor his final report as trustee, showing the sum of $1,163.24 of the funds of the township in his hands unexpended, no part of which has been paid over to his successor, the relator.

Counsel for the appellant insists that the decision of the circuit court is inconsistent with the rulings of this court in *Ohning* v. *City of Evansville*, 66 Ind. 59, and *Lowry* v. *The State, ex rel.*, 64 Ind. 421, and cases cited, wherein the doctrine is recognized "that new sureties are not responsible for prior defalcations," and that the sureties upon an officer's bond are not estopped by his acts, entries or reports, from showing when the defalcation in fact occurred. Counsel says: "Now, the $2,400 received for his stock, at no time while in his hands, belonged to the township in any sense whatever. That was

his money, and its receipt from the purchaser of his stock was not embraced by the condition of the bond, because that condition only embraced money received by him, belonging to the township in some sense; that is, money received by him from the public funds."

The fallacy of the argument is manifest. The condition of the trustee's bond required him to receive, account for or pay over to his successor "all moneys belonging to the township." This was broad enough to include all moneys due the township from his predecessor in office, and the fact that he was his own predecessor does not alter the proposition.

The facts found by the court show that Thomas became a defaulter in his prior term of office—not because he invested money received from public sources in his private business, for that he had a right to do, so long as he kept himself ready to pay out according to law all sums required for public uses. *Linville* v. *Leininger*, 72 Ind. 491, and cases cited; *Bocard* v. *The State, ex rel.*, 79 Ind. 270; *Brown* v.. *The State, ex rel.*, 78 Ind. 239. But because, at the end of his term, he did not have in his hands to turn over, and did not turn over, to his successor (himself), the amount for which he was then accountable. And had he never made good this defalcation, his prior bondsmen, and not the appellants, would have been responsible therefor. He did, however, make it good, as the facts show. By the sale of his property, he obtained money and replaced that for which he was in default, and, when he did this, the appellants became liable therefor, as much as if another had been his predecessor in the office, and that other had been in like default and had afterwards made it good by payment to Thomas of the amount due.

The finding, however, goes further than this. It shows that, besides repaying to himself as trustee the amount of his prior defalcation, Thomas applied the identical money used in making the repayment to the uses of his trust during the term covered by the bond in suit, from which it necessarily results that, of the public funds received upon warrants during

that term, he did not make full account; and, for the deficiency, the court gave judgment against the appellants, as it was eminently just and lawful to do.

Judgment affirmed, with costs.

No. 8913.

WILLIAMS v. WILLIAMS ET AL.

COSTS.—*Taxation.—Judgment Conclusive.—Supreme Court.*—The Supreme Court will not look into the merits of a cause to determine whether costs are properly taxed, but will regard the verdict and judgment as conclusive upon such question against the unsuccessful party.

SAME.—*Decedent's Insolvent Estate.—Claimant's Action on Administrator's Bond.*—A claimant against a decedent's insolvent estate, having received a part of her claim, and failing, in an action on the administrator's bond, to recover more, may not complain of the overruling of her motion to tax against her adversaries the costs from the commencement of the action until the last payment to her.

From the Huntington Circuit Court.

L. P. Milligan, J. C. Branyan, C. W. Watkins and *M. L. Spencer*, for appellant.

B. M. Cobb, for appellees.

ELLIOTT, C. J.—A claim for seven hundred and fifty dollars was allowed against the estate of John G. Williams, deceased, represented by the appellee Minerva Williams, in October, 1878, and during the year 1874 the administratrix paid on the claim $244.87. On the 22d day of May, 1878, this action was commenced by the appellant on the bond of the administratrix. A trial was had and verdict returned in appellant's favor on the 17th day of June, 1879. On the motion of the appellees, a new trial was granted. The second trial resulted in a verdict in their favor. The appellant moved to

tax the appellees with all costs which had accrued from the time of the filing of the complaint until the payment of the sum of $338.84, which was some time in September, 1879.

On the 14th day of October following, the appellees filed an answer, alleging the payment of $338.84, that the estate was insolvent, had been so declared by the court, and that the sum paid was all the appellant was entitled to receive.

We think the court did right in overruling appellant's motion. If she had accepted the sum paid as a full satisfaction of her claim, it would have been otherwise; but she chose to demand more, and to compel a trial, and she must accept the result which attends an unsuccessful suitor. Not having recovered an amount sufficient to carry costs, she can not have them taxed against her adversaries.

The case of *The Jeffersonville R. R. Co.* v. *Weinman*, 39 Ind. 231, is not in point. In that case the amount paid by the defendant was accepted in full satisfaction of the claim, and the action dismissed. A full explanation of the case appears in the case of *The Jeffersonville R. R. Co.* v. *Kalen*, 39 Ind. 233, and note.

The appellant did not treat the payment as in full, and was not, of course, precluded from endeavoring to collect the remainder claimed by her in excess of the payment. As she chose to treat the payment as a partial one, and attempted to enforce a claim to a much larger sum, she is not in a situation to demand costs.

We can not look into the merits of a cause to determine whether costs are properly taxed. The verdict and judgment are, upon such a question, conclusive against the unsuccessful party. We can not, in the present case, examine the evidence to ascertain whether the appellees ought or ought not to have recovered judgment. The judgment determines that the appellant was not entitled to any recovery, and we can not, upon a motion such as that filed, look beyond the judgment of the trial court.

Judgment affirmed.

No. 8573.

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Short v. Stutsman et al.

Practice.—*Reserved Question of Law.—Appeal to Supreme Court.—Statute Construed.*—A reserved question of law can not be presented under section 630, R. S. 1881, unless it appears that the particular question virtually arose, and was decided by the trial court, during the progress of the cause.

Same.—*Exception.—Instruction.—Record.*—A party can not formulate such question of law as he conceives to be involved in the pleading or to arise upon the facts proved, and present it to the Supreme Court under said section 630; and where such question arises upon an instruction, the record must contain the instruction, and it must appear that an exception was taken to the ruling of the court.

From the Elkhart Circuit Court.

L. Warner, J. M. Vanfleet and *E. C. Bickel*, for appellant.

J. H. Baker and *J. A. S. Mitchell*, for appellees.

Best, C.—The questions sought to be presented by this record are brought upon bill of exceptions only, under section 347 of the code.

The bill of exceptions recites, "That at the proper time the plaintiff notified the court that it desired to take the following questions of law to the Supreme Court, under section 347 of the code, to wit:

"1st. Did the fact that Longley procured Miller to sign said bond on Sunday, delivering the same to the plaintiff on a secular day, without notice that it was signed on Sunday, give Miller a valid defence to the bond?

"2d. Was or was not the defendant Miller bound by his agreement to pay said debt, made after a breach of the condition of said bond?

"3d. Was there any issue under which the defendants could prove that the corporation plaintiff was not the real party in interest, or that said Alfred Short owned said claim individually?

"Whereupon the court, on motion of the plaintiff, in order

to enable the Supreme Court to apprehend and properly determine the above points, ordered that the following matter be made part of the record, to wit:

"1st. The complaint and exhibit.

"2d. The 4th, 6th and 7th paragraphs of the answer.

"3d. The 1st and 4th paragraphs of reply.

"4th. The verdict of the jury.

"5th. Subdivisions A, B, C, D and P of third cause assigned in the motion for a new trial.

"6th. The signatures to and endorsements upon each of said papers, and the order book entries showing the filing of the same in court; the entry showing the time given to file this bill of exceptions; the final judgment of the court, and no other entries or papers whatever. The court also states that the evidence tended to show that said Longley procured said Miller to sign said bond on Sunday, and that said Miller delivered said bond to Longley on Sunday, and that Longley delivered said bond to the plaintiff on a secular day, without any notice that said Miller had signed it on Sunday; and the evidence tended to show that said organ No. 486 was shipped to said Longley after the delivery of said bond to the plaintiff, and sold and the proceeds thereof received by said Longley before the plaintiff knew that said bond was signed by said Miller on Sunday. And the court instructed the jury that if said Miller signed said bond on Sunday, their verdict must be for the defendant Miller, unless he afterward ratified it in such way as to bind him, to which ruling of the court the plaintiff, at the proper time, by counsel, excepted.

"The court further states that the evidence tended to show that the plaintiff's agent, Mr. Warner, before the commencement of this suit, and while he held the obligation sued upon as an attorney for collection, presented the notes mentioned in the complaint to the defendant Miller, and that said Miller then promised to pay his half of the same, and that the court instructed the jury that if this evidence was found to be true, and also that said Miller signed said bond on Sunday, he could

not be bound by such subsequent promise, unless there was some new consideration for it, to which instruction the plaintiff at the time, by counsel, excepted.

"And the court further states, that the defendants were allowed, over the objection of the plaintiff, to introduce evidence that said Alfred Short personally owned said notes mentioned in the complaint. The plaintiff objected to said evidence because of irrelevance. The court also instructed the jury that if they should find from the evidence that said Alfred Short personally owned said notes before and at the commencement of this suit, the plaintiff could not recover, to which instruction the plaintiff at the time, by counsel, excepted."

The appellees insist that the questions presented did not arise, and were not decided by the lower court, during the progress of the cause, and, therefore, no question arises for the decision of this court.

For the purpose of determining this question, it is not necessary to set out the pleadings nor the residue of the record. Section 347 of the code reads: "Either party may reserve any question of law decided by the court during the progress of the cause, for the decision of the Supreme Court. Any question of law so reserved may be taken to the Supreme Court upon the bill of exceptions showing the decision, or, if it arises on demurrer, upon the pleadings involved. When the question so reserved is shown by bill of exceptions, the party excepting shall notify the court that he intends to take the question of law to the Supreme Court upon the bill of exceptions only; and the court shall thereupon cause the bill of exceptions to be so made that it will distinctly and briefly embrace so much of the record of the cause only and the statement of the court, as will enable the Supreme Court to apprehend the particular question involved."

In order to present a question under this section of the code, the bill of exceptions must show that the particular question of law was decided by the court, during the progress of the cause, that an exception was reserved, and that the party

notified the court that he intended to take the question of law to the Supreme Court upon the bill of exceptions only. If the particular question of law was not decided by the lower court, it is manifest that this court has no power to decide the question. This court can only review such questions as have been decided by the lower court, whether they are presented under section 347 of the code or by an appeal in any other mode.

Again, if the question is decided during the progress of the cause, an exception must be reserved to the decision, in order to save the question. This rule is familiar, and is as applicable to a question reserved under section 347 of the code as to a question presented in any other way.

Applying these rules to these particular questions, it is manifest, we think, that they present no question for decision. The record does not show that the court decided either one of them, nor does it show that either of them arose in such a way that it could have decided them. The forms of the questions indicate that the court was not expected to decide them, but they were to be submitted to this court for decision in the first instance. This can not be done. Nor can a party formulate a question which he supposes arises upon the facts under the issues and obtain a decision upon it in such way. The questions that may be reserved under this section are such as actually arise and are decided during the progress of the cause —such, for instance, as are made in admitting or excluding testimony, in giving or refusing instructions, etc., and not such as the party conceives to be involved in the issues, or to arise on the facts proved.

Neither of these questions arose upon demurrer to the pleadings, nor upon the admission of the testimony, nor in giving the instructions to the jury. It is true that exceptions were taken to the several instructions given, but these decisions were not reserved under said section and are not presented. Besides, if they had been reserved, they would have been un-

availing, for the reason that the instructions themselves are not in the record.

For these reasons, we think the record presents no question for decision, and that the judgment must be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the costs of appellant.

ON PETITION FOR A REHEARING.

ELLIOTT, C. J.—It is certainly true that this court can not be called upon to decide a question not decided by the trial court. It is equally true that the record must affirmatively show that the questions sought to be reserved under section 347 of the code of 1852 were decided by the court trying the cause. The statement of the party to the court, that he desires to reserve a question, is not sufficient. The record must show a decision upon the question, and must contain so much of the proceedings as will enable the appellate court to fully understand the nature of the question.

The statute does not contemplate the reservation of mere abstract questions. Real questions, such as actually arise during the progress of the trial, may be reserved, but not mere general questions, which are not presented in the progress of the cause. A question upon an instruction may doubtless be reserved, but not by a general statement of the abstract question of law which counsel may suppose it to present. The question, in such a case, may be reserved by setting out the instruction, the exception to it, and so much of the pleadings and record as may be necessary to fully and accurately present, on appeal, the real question which was actually presented to and passed upon by the trial court.

Petition overruled.

WOODS, J., did not participate in the decision of this cause.

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No. 8523.

MUGGE ET AL. *v.* HELGEMEIER ET AL.

SHERIFF'S SALE.—*Pleading.—Husband and Wife.—Action to Quiet Title.*—A complaint by two, not shown to be husband and wife, to quiet their title to land against an alleged illegal and void sale made by a sheriff under an execution against one of them, presents no issue except the validity of the sale, and does not require a determination of the rights in the land of one of them as the wife of the other.

SAME.—*Reply.—Departure.*—In an action to set aside a sheriff's sale, a reply, which sets up different irregularities from those alleged in the complaint, is a departure.

SAME.—*Execution.—Appraisement.*—Under an execution upon a judgment, a part of which is directed to be collected without appraisement, a sale without appraisement is proper.

SAME.—*Real Estate Fraudulently Conveyed.*—Real estate, which the debtor has conveyed or caused to be conveyed with intent to defraud his creditors, may be sold without appraisement on an execution which does not waive appraisement, there having been an adjudication that the conveyance was fraudulent, although the adjudication contain no express order for sale without appraisement.

SAME.—*Statute Construed.*—Section 381, code of 1852 (R. S. 1881, section 576), does not apply to the sale on execution of real estate fraudulently conveyed by the execution debtor.

SAME.—*Separate Parcels.—Sale in Solido.*—When the real estate consists of separate parcels, and the rents and profits and the fee simple of the parcels, singly and in combinations of two, three, etc., have been properly offered and no bids received, the parcels may be all offered and sold together.

SAME.—*Inadequacy of Price.—Supreme Court.*—When the offer has been properly made to sell in parcels and in combinations of parcels, and then they are all sold together, this court will not, on account of alleged inadequacy of price, review the finding and judgment of the lower court upholding the sale of real estate by a sheriff.

PRACTICE.—*Exception to Judgment.*—A general exception to a judgment does not bring in question the correctness of a particular part of the judgment.

From the Marion Superior Court.

T. E. Johnson, for appellants.

W. N. Harding and *A. R. Hovey*, for appellees.

WOODS, J.—Complaint in two paragraphs by the appel-

lants against the appellees, the first being to quiet the title of the appellants to real estate described, in which it is alleged the appellees claim an interest by virtue of a sheriff's sale, which is declared to be void; the second being to set aside the sheriff's sale on account of certain irregularities and defects, which are specified.

The appellees defended under the sale, setting forth the facts in detail, and claiming that the sale was in all respects regular and valid.

The appellants replied in denial, and by a special paragraph, wherein it is alleged that the price bid at the sale, excepting the amount of the costs, was not paid to the sheriff, nor credited on the execution.

The court found for the defendants, and gave judgment accordingly, with a proviso that the judgment should not affect whatever right the appellant Emma, as the wife of her co-appellant, had, or might show herself to have, in the undivided third of the property.

There was a general exception taken by the appellants to the judgment, but no objection made especially to the proviso, nor motion to strike it out or modify it.

The error assigned at the general term was the overruling of the motion for a new trial. That ruling is therefore the only one which comes before us for review.

Counsel for the appellant urges strenuously that the court had no right to put the proviso named above in its judgment, but should have determined and adjudged what the rights of Mrs. Mugge were, and quieted her title accordingly, as, that was "one of the objects of the suit."

It is manifest, however, if the question were presented, that the complaint was not framed with that design, and is not such as to warrant such a decree. It does not appear in either paragraph that the plaintiffs are husband and wife.

A joint ownership is alleged, and that their title is clouded by an irregular and void sheriff's sale, made by virtue of an execution against one of them. The only issue tendered,

therefore, and the only one joined by the answer, was the validity of that sale. On that issue alone was the court required to find and adjudge; and it is certainly not available cause for complaint by the appellants or either of them, that the court limited its judgment by the proviso, which, if it has any effect, is for their benefit.

The principal objections made to the sheriff's sale are: That it was made without an appraisement of the rents and profits, and of the property itself, that, consisting of separate parcels, the property was sold in a lump, and that the purchase price was not paid, nor credited on the writ.

The last objection has no foundation in the evidence, if even in the pleading, where it appears only in the reply, and, in reference to the second paragraph of the complaint, at least, is a clear departure.

An appraisement was not necessary. The judgment on which the execution issued, by virtue of which the sale was made, was for a sum exceeding a thousand dollars, of which an amount exceeding three hundred dollars was directed, in the judgment, to be collected without relief from valuation or appraisement laws, the remaining portion being with relief; and these facts were properly recited in the writ.

It necessarily follows that so long as any part of the sum due upon the writ remained unpaid, which was collectible without relief, a sale without appraisement was lawful. It has been held that the sale may be so made where there are executions upon three judgments simultaneously rendered, one of which only is without relief. *Robinson* v. *Bush*, 17 Ind. 517. And so, also, in case of a judgment in attachment rendered in favor of several claimants, when several executions are issued against the property, some of which are collectible without appraisement. *Shirk* v. *Wilson*, 13 Ind. 129.

There is no ground for making a distinction where different parts of a judgment are collectible, one without and another with appraisement. Besides, it was shown that the title to the lands in question had been put in the name of the appel-

lant Emma, and, upon complaint of the judgment plaintiff, it had been found that they were in fact the lands of her co-appellant, the judgment defendant, and had been conveyed to her in fraud of his creditors, and, accordingly, it had been ordered and adjudged that the conveyance be set aside as fraudulent, and that the lands be sold in satisfaction of the said judgment. It is a statutory provision that property conveyed by a debtor with intent to hinder, delay or defraud his creditors, shall be sold without appraisement. Code of 1852, section 456, R. S. 1881, section 743.

It is suggested that this provision does not apply in this instance, because the conveyance which was declared fraudulent was not made by the debtor; but we are of the opinion that it applies to property which the debtor fraudulently procured to be conveyed to another, and which ought to have been conveyed to himself, as well as to such as he may have had in his own name, and himself have fraudulently conveyed to another.

It is further objected that in the judgment whereby the title of Mrs. Mugge was set aside, and the land declared subject to the execution upon said judgment, it was not ordered that the same be sold without appraisement; and it is insisted that under section 381 of the code, R. S. 1881, section 576, "When a judgment is to be executed without relief from appraisement laws, it shall be so ordered in the judgment."

We are clear, however, that the provision cited is not applicable. When a judgment is rendered upon a contract waiving appraisement, or in cases wherein, on account of the nature of the cause of action, an appraisement is not allowed, it must be so expressed in order that the execution may so issue. *Stevenson* v. *The State, ex rel.*, 71 Ind. 52. The judgment whereby, in this case, the fraudulent conveyance was set aside, and the property declared subject to the execution, was not, however, the judgment by virtue of which the sale in question was made. That judgment simply settled the fact that the fraudulent conveyance had been made, and that the property

was subject to sale on the execution. It followed, as matter of law, that the sale should be without appraisement, even though the original judgment and execution had not so provided.

It remains to be considered whether the sale ought to have been set aside because not made in parcels. The sheriff's return shows that the rents and profits for the period of seven years, of each parcel, were separately offered, and then of the different parcels in various combinations, and of all together, and then each parcel in fee simple was offered, and in like manner the different parcels in combinations of two, three, etc., and, no bids having been made, the parcels were all offered together and struck off to the judgment plaintiff for the sum of $1,202.61; and for $1,150.90 of that sum the judgment plaintiff receipted upon the writ in full thereof, and paid the remainder to the sheriff in satisfaction of the costs.

The question, therefore, which the record presents, is whether, after making a proper offer of the rents and profits, and of the fee simple of different parcels of real estate, the sheriff may offer and sell the parcels together, in satisfaction of an execution. The question has been decided adversely to the appellants in *Weaver* v. *Guyer*, 59 Ind. 195.

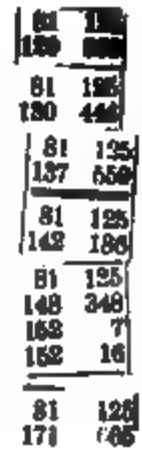
This question, however, the appellants' counsel has not urged upon our consideration, the point of the argument which he makes being that the offer in parcels was a nullity, because made without an appraisement—an objection which we have shown to be unfounded.

There is some conflict in the evidence as to the value of the land sold, and, the sheriff having offered the parcels separately and in different combinations of two, three or more, before offering all together, there is no ground upon which this court can say that the price received was inadequate, in the face of the finding and judgment of the superior court to the contrary.

Judgment affirmed, with costs.

No. 9060.

Bitters v. The Board of Commissioners of Fulton County.



Constitutional Law.—*Publication of Delinquent Tax List.—Fees and Salaries.—Repeal of Statute.*—Section 28 of the fee and salary act of March 31st, 1879, Acts 1879, p. 130, fixing the price for publishing delinquent tax lists, is embraced within the title of the act and is constitutional, and repeals that clause in section 3 of the act of March 21st, 1879, Acts 1879, p. 199, in relation to such publication.

From the Fulton Circuit Court.

J. S. Slick, for appellant.

I. Conner, for appellee.

Elliott, C. J.—Appellant published the delinquent tax list of Fulton county, and claimed compensation at the rate of thirty-five cents for each description; the county board refused to allow the amount claimed, but did allow twenty cents, and the circuit court, on appeal, sustained the judgment of the board.

Two acts containing provisions relative to the compensation to be paid for publishing the delinquent tax lists were passed by the General Assembly at the session of 1879, the first on the 21st and the second on the 31st day of March. In section 3 of the act of March 21st is a provision that the county auditor shall have the delinquent list published "at a cost not exceeding twenty cents per tract." Acts 1879, p. 199. Section 28 of the act of March 31st reads thus: "For publishing delinquent list, 35 cents for each description." The first act is amendatory of, and supplementary to, "An act to provide for a uniform assessment of property, and for the collection and return of taxes thereon." The second is what is generally known as the "fee and salary bill." It is conceded by appellee that if section 28 of the latter act is valid, it repeals the clause in section 3 of the earlier act making provision for printing the delinquent list. The contention is, that section 28 is unconstitutional.

It is a familiar rule that laws enacted by the supreme legislative power of the State will be upheld, unless they are clearly in conflict with the constitution. In doubtful cases the judiciary will respect and maintain the acts of the legislative department of the government.

We do not think it can be justly said that section 28 is not within the title of the act of 1879. It is not necessary that the title should embrace all the specifications necessary to exhibit its subject-matter in detail. The title of the act of March 31st, 1879, reads thus: "An act fixing certain fees to be taxed in the offices, and the salaries of officers therein named; providing for certain employes in certain public offices, and fixing their compensation; defining certain duties and liabilities of officers and persons therein named; providing for the disposition of certain moneys, making certain appropriations; declaring certain violations of the provisions of this act to be a penal offence, and prescribing the punishment, and repealing all conflicting laws."

The title of the act is broad enough to cover the publication of delinquent tax lists. The publication of the list is properly connected with the duty of public officers, and the compensation to be paid for services rendered in advertising matters expressly required by law to be advertised by public officers, is fairly within the title of the act. The title is sufficient to indicate that the body contains provisions relative to the duties of public officers in relation to the collection of the public revenues, and what is properly connected with the compensation of officers or others engaged in levying and collecting it, is embraced within its title. *Shipley* v. *The City of Terre Haute*, 74 Ind. 297; *The State, ex rel.*, v. *Sullivan*, 74 Ind. 121; *Bright* v. *McCullough*, 27 Ind. 223; *Greencastle, etc., T. P. Co.* v. *The State, ex rel.*, 28 Ind. 382; *Brandon* v. *The State*, 16 Ind. 197. What was said in *The State, ex rel.*, v. *Sullivan, supra*, may be correctly said here: "The subject-matter and general character of the act are fairly expressed

in its title, and that is all that is required by article 4, section 19, of the constitution."

The act does not embrace two subjects. It makes provision for the performance of certain duties by public officers, and prescribes the compensation which shall be paid to officers or others rendering service to the public, in connection with public matters and official duties. Whatever is connected with official duty, and is the subject of compensation from the public treasury, is within the act, and forms part of one general subject. The act makes it the duty of the county commissioners to provide for the publication of the delinquent list, and fixes the compensation to be paid the publisher. The matter is directly connected with official duties, and the fact that the services are rendered in a matter connected with the collection of taxes, does not separate it from the general subject of services rendered the public. Services and compensation together constitute no more than parts of one general subject. Official services and duties naturally and reasonably belong to, and are included within, the same subject; they are not distinct and different subjects. It is proper to place in one act provisions for services to public officers in public matters directly connected with the duties of the offices, and limitations upon the compensation which the officers shall pay for such services. It was proper to embody in the act under examination provisions for official duties and for services to officers in the collection of the public revenues. No provision of the constitution is invaded by gathering such provisions together in one general act.

A subject may be composed of many parts. It does not follow that because the title of a statute enumerates many particulars, there are, therefore, many subjects. If there is but one subject, the act is valid, although that subject may be composed of many parts, and all of them be enumerated in the title. The rule which should here apply is that declared in *Shoemaker* v. *Smith*, 37 Ind. 122, where it was said of a title enumerating many things: "If the different particulars enu-

merated are to be regarded as so many different subjects, then the law is wholly void because of a multiplicity of subjects. If, on the other hand, the enumerated particulars do not embrace different subjects, but have reference to one general subject, which is not sufficiently expressed in the title, the law is still void. If, however, the enumerated particulars are not expressive of different subjects, but of one general subject, which is sufficiently indicated or expressed, the law is valid."

Judgment reversed.

Woods, J., dissents.

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No. 10,123.

Burk v. The State.

Criminal Law.—*Perjury.—Sufficiency of Indictment.*—Under the criminal code, section 1747, R. S. 1881, it is only necessary, in an indictment for perjury, to set forth the substance of the controversy or the matter in respect to which the crime was committed, and in what court or before whom the oath alleged to be false was taken, and that the court or person before whom it was taken had authority to administer it, with the proper averments to falsify the matter whereof the perjury is assigned, without setting forth any part of the record or proceeding, or the commission or authority of the court or other authority before which the perjury was committed.

Same.—*Materiality of Testimony.*—It must appear, though it need not be alleged in express terms, in an indictment for perjury, that the testimony given, and alleged to be false, was touching a matter material to the point in question.

Same.—*Pleading.—Former Acquittal.—Jeopardy.*—A plea of former acquittal is sufficient, if it shows that the defendant had been indicted, tried and acquitted, in a court of competent jurisdiction, for the same felony charged in the indictment in the pending case; for the fundamental law forbids, that a person charged with crime be put in jeopardy twice for the same offence.

From the Montgomery Circuit Court.

M. D. White, G. W. Paul and *J. E. Humphries*, for appellant.

D. P. Baldwin, Attorney General, *J. H. Burford*, Prosecuting Attorney, and *M. Thompson*, for the State.

HOWK, J.—On the 16th day of December, 1881, an indictment was duly found and returned into the court below, charging the appellant, Nelson Burk, with the crime of perjury. At the February term, 1882, of the court, the appellant appeared in person and by counsel, and moved the court in writing to quash the indictment, which motion was overruled, and the appellant's exception was duly saved to this ruling. The appellant then filed a written plea in bar of the further prosecution of said indictment; and to this plea the State, by its attorneys, demurred, upon the ground that it did not state facts sufficient to constitute a defence to the indictment, or to bar this prosecution. This demurrer was sustained by the court, and to this ruling appellant excepted. Upon arraignment on the indictment the appellant refused to plead thereto; and thereupon a plea of "not guilty" was entered by the court, and to such action of the court the appellant excepted.

The issues joined were tried by a jury, and a verdict was returned finding the appellant guilty, as charged in the indictment, and assessing his punishment at confinement in the State's prison for two years, and a fine in the sum of fifty dollars, and disfranchisement and incapacity to hold any office of trust or profit for two years. Over the appellant's motion for a new trial, and his exception saved, the court rendered judgment on the verdict.

In this court the appellant has assigned as errors the following decisions of the circuit court:

1. In overruling his motion to quash the indictment;

2. In sustaining the State's demurrer to his special plea in bar; and,

3. In overruling his motion for a new trial.

1. The indictment charged, in substance, that the appellant, "Nelson Burk, on the 27th day of October, 1881, at and

in the county of Montgomery, and State of Indiana, before one William Armstrong, a duly elected, qualified and acting justice of the peace, in and for Franklin township, in the county of Montgomery, and State of Indiana, then and there sitting as a court, a certain issue between one Andrew J. McMaken and one John Miller, in a certain suit and complaint for one hundred and eighty dollars, for money had and received of said Andrew J. McMaken by the said John Miller, wherein the said Andrew J. McMaken was plaintiff and the said John Miller was defendant, came on to be heard and tried in due form of law; the said justice of the peace then and there sitting as a court, and having then and there competent authority in that behalf, and the said issue was being tried then and there by a jury of the county, duly sworn and taken between the parties aforesaid, upon which said trial one Nelson Burk then and there appeared as a witness for and in behalf of said plaintiff Andrew J. McMaken, and was then and there duly sworn as such witness by the said William Armstrong, as such justice of the peace, then and there having full power and competent authority to administer the said oath to the said Nelson Burk, as such witness in that behalf; that upon the trial of said cause and issue joined between the said parties aforesaid, it then and there became and was material to the said issue and point then and there in question, whether the said plaintiff in said cause, the said Andrew J. McMaken, did, on the 13th day of August, 1881, at the city of Crawfordsville, in the county of Montgomery, and State of Indiana, purchase of the said defendant in said cause, John Miller, the cattle mentioned in the complaint of said Andrew J. McMaken against John Miller, in said cause, and pay said John Miller on the purchase price thereof a sum of money; and the said witness Nelson Burk, then and there on the trial of said cause, and on the trial of said issue, upon his oath aforesaid, unlawfully, feloniously, wilfully, corruptly and falsely before the justice, the court and jury aforesaid, did depose and swear, in substance, and to the effect following, that is to

say: that said Andrew J. McMaken, plaintiff in said cause, did, in his presence, on the 13th day of August, 1881, at the city of Crawfordsville, Indiana, buy said cattle of and from the said John Miller, and then and there paid to the said Miller a sum of money upon the purchase price of said cattle, and that the said Andrew J. McMaken did, on the 13th day of August, 1881, between the hours of two o'clock P. M. and five o'clock P. M., of said day, near the alley between the Joel clothing store and Gregg's hardware store, in the city of Crawfordsville, Indiana, pay the said John Miller a sum of money for said cattle. Whereas, in truth and in fact, the said Andrew J. McMaken did not buy said cattle of and from the said John Miller on the 13th day of August, 1881, or at any other time, and pay a part of the purchase price on said cattle in the city of Crawfordsville, or any other place; and whereas, in truth and in fact, the said Andrew J. McMaken did not on the 13th day of August, 1881, between the hours of two and five o'clock P. M., of said day, at the city of Crawfordsville, Indiana, or any other place, pay the said John Miller a sum of money on the price of said cattle, all of which was well known to the said Nelson Burk at the time he so testified. Wherefore the said grand jury, on their oath aforesaid, do charge and present that the said Nelson Burk, in manner and form as aforesaid, did then and there feloniously, wilfully, corruptly and falsely commit wilful and corrupt perjury, contrary to the form of the statute," etc.

It will be seen that the indictment charged that the alleged offence was committed by the appellant on the 27th day of October, 1881. At that time the act of April 14th, 1881, concerning public offences and their punishment, had taken effect, and was in force. In section 101 of said act (section 2006, R. S. 1881), it is provided as follows: "Whoever, having taken a lawful oath or affirmation in any matter in which, by law, an oath or affirmation may be required, shall, upon such oath or affirmation, swear or affirm wilfully, corruptly, and falsely touching a matter material to the point in ques-

tion, shall be deemed guilty of perjury, and, upon conviction thereof, shall be imprisoned in the State prison," etc.

In section 173 of the criminal code of 1881 (section 1747, R. S. 1881), it is provided as follows: "In an indictment or information for perjury or subornation of perjury, it shall only be necessary to set forth the substance of the controversy or the matter in respect to which the crime was committed, and in what court or before whom the oath alleged to be false was taken, and that the court or person before whom it was taken had authority to administer it, with the proper averments to falsify the matter whereof the perjury may be assigned, without setting forth any part of any record or proceeding or the commission or authority of the court or other authority before which the perjury was committed."

With these statutory provisions before us, we will briefly consider and decide the points made by the appellant's counsel in discussing the alleged error of the trial court in overruling the motion to quash the indictment. It is claimed by counsel that the indictment is insufficient, because it does not allege that any complaint was filed before the justice, Armstrong, and does not show how the issue was formed or how the case got before the justice; and many decisions of the courts of last resort in other States are cited, for the purpose of showing that such allegations were necessary to the sufficiency of the indictment. We deem it unnecessary for us to consider the cases cited, for, upon the points under consideration, the statute of this State expressly declares that, in an indictment for perjury, "it shall only be necessary to set forth the substance of the controversy or the matter in respect to which the crime was committed." Under this statutory provision, it was wholly unnecessary, we think, that the indictment should allege that a complaint was filed before the justice, or show how the issue was formed, or how the case got before the justice. It will be seen from the indictment, the substance of which we have given, that it did set forth the substance of the controversy in respect to which the crime was

committed, and this was all that was necessary under the statute.

It is further claimed by appellant's counsel that the indictment is bad, because it does not allege that the trial was before Justice Armstrong and a jury; but, by reference to the indictment, it will be seen, as we think, that this fact is alleged with sufficient certainty. Counsel also complain of the grammatical construction of the indictment, and of the many lines that intervene between the noun and the verb; but, if it were conceded that their criticism, in this respect, were well founded, we do not think that it would afford any sufficient ground for quashing the indictment. For, notwithstanding the defect complained of, we are of the opinion that the indictment states the offence charged with sufficient certainty.

Again, the appellant's counsel say, "The indictment must allege that the testimony was material, not that it became a material question, but that the testimony given was material; and the indictment must show that the testimony given was material. There is no allegation that the testimony given by defendant was material to the issue or point in question." If counsel claim that the indictment was bad, because it did not allege, in so many words, that the testimony given by defendant was material, we do not think that such claim is well taken, or can be sustained. It must appear from the indictment that the testimony given was, in the language of the statute defining the offence, "touching a matter material to the point in question;" but certainly it was not necessary that the indictment should allege, in express terms, that the testimony given was material to the point in question. For such an allegation would be nothing more than the mere statement of an inference or conclusion, deduced from the testimony given, and not the statement of a fact forming a constituent part of the offence charged. Under the criminal code of this State, an indictment must contain "a statement of the facts constituting the offence," and not of inferences or conclusions, whether of

law or of fact. Crim. Code of 1881, section 157; section 1731, R. S. 1881; *Howard* v. *The State*, 67 Ind. 401.

Many other objections are urged in argument, by the appellant's counsel, to the sufficiency of the indictment in this case; but these objections seem to us to have reference solely to the supposed uncertainty of the indictment, in charging the offence. Without examining these objections separately, we may say generally that we are of the opinion, under the provisions of the statutes of this State bearing upon the offence charged and the description thereof, the indictment was sufficient. The offence charged, and the facts constituting the same, were set forth with sufficient clearness, and with such a degree of certainty that the court could pronounce judgment, upon a conviction, according to the right of the case, and we have not found any such defect or imperfection in the indictment as would tend even, in our opinion, to the prejudice of the substantial rights of the appellant upon the merits.

Our conclusion is, therefore, that the court committed no error in overruling the appellant's motion to quash the indictment.

2. Did the trial court err in sustaining the State's demurrer for the want of sufficient facts, to the appellant's plea in bar of this prosecution? In this plea, the appellant alleged in substance, that the State of Indiana ought not further to prosecute the indictment in this case, because he said that theretofore, to wit, at the circuit court begun and held at the courthouse, in Crawfordsville, in said Montgomery county, the appellant was put upon trial, upon an indictment found by the grand jury of said county, and in the indictment upon which he was tried, it was alleged that, at and in the county of Montgomery, and State of Indiana, the appellant did feloniously, wilfully, corruptly and falsely swear upon oath, that he did, at the city of Crawfordsville, Indiana, see Andrew J. McMaken, in his presence, buy the cattle charged to be stolen, of John Miller, on the 13th day of August, 1881, between the hours of two and five o'clock P. M., and then and there pay

the said John Miller a sum of money on the purchase price of said cattle, between Joel's clothing store and Gregg's hardware store, in the city of Crawfordsville, Indiana; and it was alleged in the indictment he was then tried upon, that said facts were not true, and that appellant was guilty of perjury. And the charge of perjury in the indictment, that appellant was tried upon, was the same language, in substance and effect, as is charged in this indictment, and was in substance the same negation as the negation in the indictment in this case; and the State introduced in evidence, and relied for a conviction on the same evidence that the State will introduce in this case, and all the same facts and circumstances were introduced in evidence, and the State sought to convict the appellant in that case, and upon the charge he was tried on, by the same evidence the State will introduce in this case; that, upon the trial of the other case, the appellant objected to and protested against the State using said evidence, and the court held said evidence competent, and allowed it all to go to the jury, and the State put all of the evidence it will use in this case before the jury in the other case, and all of the same facts, circumstances, witnesses, transactions and statements were introduced in evidence against the appellant; and he was compelled to go through the said trial and defend himself upon the same facts, circumstances and transactions charged in the indictment in this case, and he met the same witnesses and the same evidence, the same charge and the same evidence, on the other trial, and he objected, protested and excepted to the facts, evidence and circumstances being introduced against him, but the court ruled it proper, and put him upon the trial of the same evidence and circumstances mentioned in this case. Said trial took place at the February term of the Montgomery Circuit Court, and on the 21st day of February, 1882, the jury in said other case returned a verdict of not guilty, and which judgment is in full force and effect, and unreversed. And the appellant said, that he was the same Nelson Burk that was so tried and acquitted, and the same facts and cir-

cumstances were put in evidence upon the cause he was tried and acquitted upon, and the State proved that he was sworn and testified to the same facts, circumstances and transactions, as stated in the indictment in this case, and proved it on the 27th day of October, 1881, and did not elect to prosecute him for any particular time, but put all the evidence in this case before the jury on the other trial, and he was duly acquitted, and the same charge, same facts and same statements were all put in evidence in said former case, and the charge upon which he was tried and acquitted was for stating, in substance and in effect, the same words that he was charged with stating in the indictment in this case. And this the said Nelson Burk was ready to verify. Wherefore the appellant prayed judgment, if the State ought to further prosecute the said indictment against him, in respect of the said offence therein mentioned, and that he might be dismissed and discharged from the said indictment.

We are of the opinion, that the facts stated in the appellant's plea were sufficient, if true, and the demurrer of the State concedes their truth, as they seem to be well pleaded, to constitute a good plea of former acquittal on another indictment, charging him with the commission of the same crime for which he was prosecuted in this case. The plea states, with sufficient certainty, as it seems to us, the identity of the felony charged in the indictment, in the case at bar, with that charged in the indictment, in the former case, whereof, it was alleged, the appellant was acquitted. If the plea be true, the appellant had been indicted in a court of competent jurisdiction, and tried and acquitted of precisely the same felony wherewith he stands charged in the indictment, in this case, and if these facts existed section 14 of the Bill of Rights forbade that he should "be put in jeopardy twice for the same offence." If these facts did not exist, the State should have joined issue on the appellant's plea in bar. *Clem* v. *The State*, 42 Ind. 420; *The State* v. *George*, 53 Ind. 434; *Brinkman* v. *The State*, 57 Ind. 76; *Bryant* v. *The State*, 72 Ind. 400. In the case last cited, it was said: "The law does not, and this

court will not, justify or sustain the judgment below in this case, imposing upon the appellant, as it clearly does, a second jeopardy and punishment for one and the same offence."

In the case now before us, the court erred, we think, in sustaining the State's demurrer to the appellant's plea of former acquittal.

As the judgment must be reversed, and perhaps a new trial had, for the error of the court in sustaining a demurrer to the appellant's plea of former acquittal, it would seem to be unnecessary, if not improper, for us now to consider and decide any of the questions arising under the alleged error of the court, in overruling the motion for a new trial. These questions relate chiefly to supposed errors of law, occurring at the trial, and assigned as such errors in the motion for a new trial. We can hardly suppose, that these errors, if such they be, will again occur on another trial of the cause.

The judgment is reversed, and the cause is remanded, with instructions to overrule the State's demurrer to appellant's plea of former acquittal. The clerk will issue the proper notice for the return of the appellant to the sheriff of Montgomery county.

No. 9229.

GAUNTT v. THE STATE, EX REL. STOUT, AUDITOR.

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COUNTY AUDITOR.—*Relator.—Capacity to Sue.—County Treasurer.—Defalcation.—County Commissioners.*—A county auditor may sue a defaulting county treasurer individually, in the name of the State, on his relation as such auditor, for trust funds, and for State, county, school, road, railroad, corporation and other taxes, if so directed by the board of commissioners of the county.

SAME.—*Referee.—Trust Funds.—Taxes.*—In a suit by the State on the relation of a county auditor, against a county treasurer, for trust funds, and by order of the board of county commissioners for taxes not accounted

for, a report of the referee finding the facts, and his conclusions of law, which finds a gross sum due from such treasurer, a failure to find that the board ordered the suit is not reached by exceptions to the conclusions of law, nor would the defendant, on that account, be entitled to judgment on the report.

REFEREE.—*Venire de Novo.—New Trial.—Exception.—Practice.*—Where a referee, under order, reports the facts and his conclusions thereon, an insufficiency in the facts found, by omission or uncertainty in the conclusions appearing in the report, is reached, not by motion for a *venire de novo*, but by motion for a new trial; and the conclusions may be questioned only by exceptions thereto.

From the Grant Circuit Court.

I. Van Devanter, J. W. Lacey and *W. Van Devanter*, for appellant.

R. W. Bailey, A. Diltz and *W. March*, for appellee.

FRANKLIN, C.—Appellee, as auditor of Grant county, on his relation, in the name of the State, brought this suit against appellant, as former treasurer of said county.

A demurrer was overruled to the complaint, and an answer in eleven paragraphs filed. A demurrer was sustained to the tenth and eleventh paragraphs of the answer, and a reply in five paragraphs filed. A demurrer was sustained to the third, fourth and fifth paragraphs of the reply. The case was tried by agreement before a referee, with instructions to report the facts, with his conclusions thereon, to the court. The referee heard the evidence and reported the facts, with his conclusions in favor of the appellee, to the court. Appellant filed the following motions: For a *venire de novo*, for a new trial, and for judgment in his favor on the special findings. All of which were overruled, and to all of which rulings proper exceptions were reserved. He then excepted to the conclusion of the referee, and judgment was rendered by the court for appellee.

The following errors have been assigned in this court:

1st. In overruling the demurrer to the complaint.

2d. In overruling the separate demurrer to each paragraph of the complaint.

3d. The complaint does not state facts sufficient to constitute a cause of action.

4th. In sustaining the demurrer to the tenth and eleventh paragraphs of the answer.

5th. In overruling the motion for a *venire de novo*.

6th. In overruling the motion for a new trial.

7th. In overruling the motion for judgment on the special findings.

8th. In overruling exceptions to the conclusions of law.

The first, second and third specifications of error, containing an objection to the complaint, may all be considered together.

The only objection made to the complaint is the want of capacity in the relator to bring the suit.

The 4th section of the code provides: "An executor, administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue, without joining with him the person for whose benefit the action is prosecuted."

The 12th section of the act in relation to county auditors, 1 R. S. 1876, p. 155, reads: "County auditors are authorized to institute suit and prosecute the same to final judgment and execution, in the name of the State, against principals or sureties, or either, upon any note, bond, mortgage, or any obligation, on account of any trust fund, or other fund, whether such note, bond, or mortgage, be in the name of the State or any other person."

The 5th section of the act providing for the organization of county boards, 1 R. S. 1876, p. 350, reads: "Such commissioners shall be considered a body corporate and politic by the name and style of 'The board of commissioners of the county of ——,' and as such, and in such name, may prosecute and defend suits, and have all other duties, rights and powers incident to corporations, not inconsistent with the provisions of this act."

The following provisions are contained in the assessment law, 1 R. S. 1876, p. 117:

"Sec. 184. If any such county treasurer shall refuse or neg-

lect to pay over all moneys, as provided herein, he and his sureties shall be held liable to pay the full amount which he should have paid over, together with the interest and ten per centum damages.

"Sec. 185. In any such case, the county auditor, on being instructed to that effect by the auditor of State, or by the board of county commissioners, shall cause suit to be instituted against such county treasurer and his sureties; and no stay of execution or appraisement of property shall be allowed on a judgment rendered or execution issued in such suit."

It is well settled by the statutes and decisions of this State, that if this suit had been brought upon the bond of appellant as such treasurer, it should have been brought in the name of the State upon the relation of the auditor. *Snyder* v. *The State, ex rel.*, 21 Ind. 77; *Pepper* v. *The State, ex rel.*, 22 Ind. 399; *Fry* v. *The State, ex rel.*, 27 Ind. 348; *Taggart* v. *The State, ex rel.*, 49 Ind. 42; *Neal* v. *The State, ex rel.*, 49 Ind. 51; *Scotten* v. *The State, ex rel.*, 51 Ind. 52; *Cabel* v. *McCafferty*, 53 Ind. 75; *Caldwell* v. *The Board, etc.*, 80 Ind. 99. In the case of *Vanarsdall* v. *The State, ex rel.*, 65 Ind. 176, it was held that upon a note executed to the treasurer for the use of the county, and a mortgage executed to the board of commissioners to secure the payment of the note, the suit might be brought by either the board of commissioners, or the auditor, in the name of the State upon his relation.

In the case at bar, the complaint charges that appellant, as such treasurer, collected and did not account for State, county, school, road, railroad, corporation and other taxes, fines, forfeitures, school funds, school fund interest, and redemption money for lands sold for taxes. A bill of particulars of which is given.

The statute of three years' limitation as to the sureties on the bond had run against all the charges, and the six years' as to the principal had run against the greater portion of the charges.

The suit was not brought upon the bond, but against the

ex-treasurer individually, for the collection of the money. A part of the claim sued on was for trust funds, upon which, by the 12th section, *supra*, the auditor was expressly authorized to sue in the name of the State upon his relation, and the complaint avers that he was directed by the board of commissioners to sue upon the whole of the claims.

There being a good cause of action in favor of the plaintiff for the trust funds, and the board of commissioners having yielded any right they may have had to sue for any part of the claims, by directing the auditor to bring the suit, we think the suit was properly brought in the name of the State on the relation of the auditor.

In the case of *Snyder* v. *The State, ex rel., supra*, it was held: "The general system of checks and balances contemplated by the revenue laws, and intended to enable the auditor to properly charge the treasurer with what funds he receives, also strongly favors the construction, that suits upon an ex-treasurer's bond should be brought upon the relation of the auditor, and not of the incoming treasurer." The same reason would equally apply where suit is brought individually against the ex-treasurer for the money, without suing him upon his official bond.

This complaint states sufficient facts, and there was no error in overruling the demurrer to it.

The 4th specification of errors: "The sustaining of the demurrer to the tenth and eleventh paragraphs of the answer," has not been presented or discussed by appellant in his brief, and is therefore waived.

The 5th error complained of is the overruling of the motion for a *venire de novo*.

This motion was based upon the insufficiency of the finding of the facts, and the uncertainty of the conclusion, as reported by the referee.

The 350th section of the code, 2 R. S. 1876, p. 178, provides, that the referees, if required, "must state the facts found and the conclusions of law separately, and their deci-

sion must be given and may be excepted to and reviewed in like manner. The report of the referees upon the whole issue stands as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried by the court. When the reference is to report the facts, the report has the effect of a special verdict."

In this case, the record shows that by agreement "the cause was referred to John C. Nottingham, of Grant county, Indiana, as referee; who shall be duly sworn as such, and shall thereupon find the facts under said issues, and report the facts so found, and the conclusions thereon, to said court on the first day of the next term thereof."

The report of the referee is as follows: "The undersigned referee, appointed by the Grant Circuit Court to try the above cause, and make a finding of the facts therein and his conclusions thereon, reports to the court, that, after being duly qualified as required by the order of reference in said cause, and plaintiff having filed a written request to find all the facts and conclusions of law thereon specifically, and stated separately, I have, pursuant to said order, tried the issues therein, and, after hearing all the evidence, argument of counsel, and due deliberation had, have made and hereby report to the court the facts found by me as such referee, under said order of reference, together with my own conclusions thereon, namely:

"That Russell J. Gauntt, who was duly elected and qualified to act as treasurer of Grant county, Indiana, for the term of two years, entered upon the duties of said office on the 2d day of August, 1869; that he was duly elected and qualified as his own successor in said office, and entered upon the duties of said office of treasurer for his second term on the 2d day of August, 1871; that Jesse H. Nelson was duly elected and qualified as his successor at the end of his said second term, who entered upon the duties of his said office as such successor of said defendant on the 2d day of August, 1873; that said defendant, during his said first term of office as such treasurer, collected as taxes the sum of $611.28, which he failed to ac-

count for, or pay over, of which sum so collected the sum of $506.39 was collected on and after June, 1870; that, during his second term of office, defendant, as such treasurer, collected as taxes the sum of $3,551.94, which he failed to account for or pay over, of which sum so collected during his second term, the sum of $1,538.10 was collected on and after June 1st, 1872; that said defendant made his reports to, and settlements with, the board of commissioners of said county of Grant, for the years ending respectively, May 31st, 1870, 1871, 1872 and 1873; which reports and settlements were made at the regular June sessions of said board for each of said years, and that the items and sums going to make up the amounts which said defendant so failed to account for, or pay over, as aforesaid, was not included in any of said reports and settlements, nor did they constitute any part of the sums and amounts so reported to, and settled for, with said board.

"And as a further fact I find that there is an entry upon the record of the proceedings of said board, of an approval and determination by said board upon the report and settlement of said defendant for the year ending May 31st, 1870; but there is no such entry upon the records of said board of any finding, approval or determination by said board upon the said reports and settlements of the defendant for each of the years ending respectively May 31st, 1871, 1872 and 1873, but that all of said defendant's reports or settlements are entered upon the records of said board of commissioners aforesaid. I further find that neither of said adjudications was in any manner obtained by fraud or concealment.

"I find, as conclusions of law, upon the above found facts, as follows, to wit: That said settlements, so made by said board with said defendant, are full and final adjudications upon all items and matters included in said reports to said board; but they are not adjudications upon such items and matters as were not therein included as aforesaid, and that all of said sums, so unaccounted for and not paid over, are barred by the statute of limitations, except said sum of $1,538.10 collected

on and after June 15th, 1872. I therefore find that the defendant is indebted to the plaintiff in the sum of $1,538.10."

Under the foregoing statute, if the referee is only required to report the facts, his report stands as a special verdict; but if, in addition to reporting the facts, he is required to state his conclusions of law thereon, then the report assimilates nearer to a special finding or a statement of the facts, and a statement of the conclusions of the law thereon, by the court. *Gilmore* v. *The Board, etc., of Putnam County,* 35 Ind. 344.

We see no ambiguity, inconsistency, or uncertainty in the facts found, that would prevent the court from rendering the proper judgment. If there are any deficiencies arising from omissions or incorrect findings, the remedy is by motion for a new trial, and not for a *venire de novo.* *Graham* v. *The State, ex rel.,* 66 Ind. 386; *Vannoy* v. *Duprez,* 72 Ind. 26; *Jones* v. *Baird,* 76 Ind. 164; *Ex Parte Walls,* 73 Ind. 95.

If the finding contains a statement of the evidence and not of the facts, it may be set aside on motion for a *venire de novo.* *Parker* v. *Hubble,* 75 Ind. 580; *Jones* v. *Baird, supra.*

In the case at bar, the finding states the facts and not the evidence. There was no error in overruling the motion for a *venire de novo.*

The 6th specification of errors, overruling the motion for a new trial, is not referred to by appellant in his brief, and is therefore waived.

The 7th specification of errors is the overruling of appellant's motion for a judgment in his favor upon the statement of facts or special findings of the referee.

If the report is to be regarded in the light of a special finding, there is nothing in it that is contradictory to, inconsistent or irreconcilable with the general finding or conclusion, and there was no error in overruling the motion.

If the report is to be regarded as a statement of the facts, and the conclusions of law thereon, then the objection to the conclusions of law is to be taken advantage of, by excepting to the conclusions of law, which appellant did in the court below,

and has assigned the overruling thereof as error. And appellant insists that the conclusions of law are erroneous, for the reasons that the referee did not find the fact that the board of commissioners had directed the auditor to bring the suit, and that he did not also find to what fund the indebtedness of defendant to plaintiff belonged.

We do not think that the direction of the board of commissioners was essential to the authority of the auditor to bring the suit, as for a part of the funds claimed, at least the trust funds, the statute gave him authority to sue without such direction, and as to the apportioning of the amount recovered among the different funds to which it belonged, that would be the duty of the auditor, after the collection had been made.

No objection was made or exception taken to the rendition or form of the judgment. And we think there was no error in the conclusions of law.

From the facts found by the referee, appellant ought not to complain of the judgment.

We find no error in this record.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be and the same is in all things affirmed, with costs.

No. 8903.

ROTAN ET AL. *v.* STOEBER.

PRACTICE.—*Evidence.—Exception.*—An objection to the admission of evidence must be stated and an exception reserved in the trial court, to present the question of its admissibility in the Supreme Court.

SAME.—*Promissory Note.—Non Est Factum.*—In an action upon a promissory note, where the defendant pleads *non est factum*, *prima facie* evidence of the execution of the note entitles it to be read in evidence.

on and after June 15th, 1872. I therefore find that the defendant is indebted to the plaintiff in the sum of $1,538.10."

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We see no ambiguity, inconsistency, or uncertainty in the facts found, that would prevent the court from rendering the proper judgment. If there are any deficiencies arising from omissions or incorrect findings, the remedy is by motion for a new trial, and not for a *venire de novo*. *Graham* v. *The State, ex rel.*, 66 Ind. 386; *Vannoy* v. *Duprez*, 72 Ind. 26; *Jones* v. *Baird*, 76 Ind. 164; *Ex Parte Walls*, 73 Ind. 95.

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We do not think that the direction of the board of commissioners was essential to the authority of the auditor to bring the suit, as for a part of the funds claimed, at least the trust funds, the statute gave him authority to sue without such direction, and as to the apportioning of the amount recovered among the different funds to which it belonged, that would be the duty of the auditor, after the collection had been made.

No objection was made or exception taken to the rendition or form of the judgment. And we think there was no error in the conclusions of law.

From the facts found by the referee, appellant ought not to complain of the judgment.

We find no error in this record.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be and the same is in all things affirmed, with costs.

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SAME.—*Witness.—Hearsay.*—Where, on cross-examination of a witness, it appears that all he knew about what he had testified was hearsay, it is proper for the court, on motion, to strike out his testimony.

From the Union Circuit Court.

T. D. Evans, for appellants.

B. Burke, for appellee.

ELLIOTT, C. J.—The questions requiring consideration arise upon the ruling refusing a new trial.

It is complained by appellants that the court erred in permitting the appellee to give certain testimony in reply to that introduced by them; but this complaint is unavailing for the reason that no objection was stated, nor any exception reserved, to the admission of the evidence.

There was no error in admitting the note sued upon in evidence although the appellants had pleaded *non est factum*. The evidence made at least a *prima facie* case for the appellee, and this entitled her to read the note to the jury.

Appellants produced a witness who testified, and this as the record shows was all that he did testify, in chief, that "Daniel T. Eckard signed John Rotan's name to that note." On cross-examination it appeared that all the witness knew about the matter was what Eckard had told him; whereupon the appellee moved to strike out all of his testimony and the motion was sustained. This was right. The testimony was mere hearsay and was plainly incompetent.

Judgment affirmed.

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No. 7988.

DUTCH ET AL. *v.* BOYD, CASHIER.

MORTGAGE.—*Situs of Land.—State.—Presumption.*—A deed or mortgage, made in the form prescribed by the law of this State, which purports to have been executed and acknowledged in and between parties resident in the State, and contains nothing to indicate a contrary intention, will be presumed to be of land in the State.

Dutch *et al. v.* Boyd, Cashier.

SAME.—*Correction of Mistake.—Statute of Frauds.*—The correction of a description of the premises conveyed, in a deed or mortgage, is not forbidden by the statute of frauds.

PROMISSORY NOTE.—*Payable to Bank Cashier.—Change of Cashier.—Right of Action.—Party.*—A promissory note, made payable to the cashier of a bank, is in effect payable to the bank, and an action may be brought in the name of a successor to the cashier named, without an assignment by the latter, who need not be made a party.

From the Boone Circuit Court.

O. P. Mahan, P. H. Dutch, C. S. Wesner, —— Dowd, H. N. Spaan and *F. Heiner*, for appellants.

G. H. Chapman, U. J. Hammond and *L. Newberger*, for appellee.

WOODS, J.—This is an appeal from a decree of foreclosure of a mortgage on real estate, and from the personal judgment rendered against the makers of the mortgage notes. The principal question to be decided is whether the mortgage contains a sufficient description of the premises intended to be described.

The mortgage is in the short form prescribed by the statute for mortgaging land in this State. We give the tenor of so much of the instrument as is relevant to the question, viz.: "This indenture witnesseth, Ira N. Holmes and Amanda D. Holmes, of Boone county, and State of Indiana, mortgage and warrant to John M. Boyd, cashier of the First National Bank of Thorntown, Boone county, Indiana, to wit: The east half of the northwest quarter of section thirty-five, township twenty north, of range two west," etc.

The appellants claim that the description does not show in what county and State the land intended to have been mortgaged is situated, and hence that the mortgage was not entitled to registration. It may be observed here, that, if it be conceded that the land is in Indiana, the description given shows it to be in Boone county. The township and range mentioned are found there but not in any other county of the State.

The counsel for the appellee advanced three propositions, on

each of which they claim that the mortgage, and the record of it, must be upheld: 1st, that the names of the county and State, where they occur in the mortgage the second time, are descriptive of the land. 2d, that, if this is not so, and the county and State, as there inserted, are an adjunct to the name of the bank, descriptive of its *situs*, then it appearing on the face of the instrument and from the certificate of acknowledgment that the mortgage was executed in this State between residents of the State, the legal presumption, in the absence of anything in the instrument to the contrary, is, that the description was intended for lands in this State; and this, it is claimed, is supported by the following cases: *Betson* v. *The State, ex rel.*, 47 Ind. 54; *Burton* v. *Ferguson*, 69 Ind. 486; *Ives* v. *Kimball*, 1 Mich. 308; *Russell* v. *Sweezey*, 22 Mich. 235; *Slater* v. *Breese*, 36 Mich. 77; *Atwater* v. *Schenck*, 9 Wis. 160; *Mecklem* v. *Blake*, 19 Wis. 397; *Pursley* v. *Hayes*, 22 Iowa, 11; *Beal* v. *Blair*, 33 Iowa, 318. 3d, that the description by section, township and range, is in itself sufficiently certain, and becomes uncertain only by reason of looking outside of the mortgage to the fact that there are, in the Northwest Territory, and in the States erected therein, a number of base lines or principal meridians, to which every such description may be referred; and that this constitutes a latent ambiguity which admits of parol evidence to show which meridian was intended. For support of this proposition, reference is made to the following cases, besides those cited *supra*: *Hanna* v. *Renfro*, 32 Miss. 125; *Bowers* v. *Andrews*, 52 Miss. 596; *Dougherty* v. *Purdy*, 18 Ill. 206; *Clark* v. *Powers*, 45 Ill. 283; *Billings* v. *Kankakee Coal Co.*, 67 Ill. 489; *Smith* v. *Crawford*, 81 Ill. 296; *Isaac* v. *Clarke*, 2 Gill (Md.) 1.

Against these propositions, counsel for the appellants have cited *Weed* v. *Edmonds*, 4 Ind. 468; *Cochran* v. *Ult*, 42 Ind. 267; *Baldwin* v. *Kerlin*, 46 Ind. 426; *Murphy* v. *Hendricks*, 57 Ind. 593; *First Nat. Bank* v. *Gough*, 61 Ind. 147; *Lee* v. *Hills*, 66 Ind. 474; *Glass* v. *Hulbert*, 102 Mass. 24; *Holmes* v. *Evans*, 48 Miss. 247; *Selden* v. *Coffee*, 55 Miss. 41; *People*

v. *Klumpke*, 41 Cal. 263; *Boyd* v. *Ellis*, 11 Iowa, 97; *Beal* v. *Blair*, 33 Iowa, 318; *Slater* v. *Breese*, 36 Mich. 77; *Mooney* v. *Cooledge*, 30 Ark. 640; *Fuller* v. *Fellows*, 30 Ark. 657.

It would seem difficult to reconcile the third proposition with the fact that the court takes judicial knowledge of the public surveys, and of the existence and location of the several base lines from which the surveys are made. Reading a description by section, township and range, in the light of this judicial knowledge, the ambiguity would seem to be a patent one, and, therefore, not explainable by evidence outside of the writing.

But our concurrence in the second proposition makes it unnecessary in this case to express any opinion concerning the first or third.

This court has several times held, in reference to promissory notes purporting to have been executed in this State, and in terms made payable at a bank named, and nothing to the contrary appearing, that it will be presumed that the bank so named is a bank in this State, and the notes therefore governed by the law merchant. *The Indianapolis, etc., Co.* v. *Caven*, 53 Ind. 258; *Walker* v. *Woollen*, 54 Ind. 164; *Roach* v. *Hill*, 54 Ind. 245. The effect of this presumption upon the rights and remedies of the parties to the paper is well understood, and the consequences are not less important than those which pertain to the application of the statute of frauds to contracts concerning real estate, the important bearing of which counsel for the appellants have urged upon our attention. We can think of no sound reason why a similar presumption should not apply to a deed or mortgage, made in the form prescribed by the law of this State, which presumably is not applicable to the conveyance of lands situated elsewhere, and which shows within itself that it was executed in the State, between parties resident in the State, and contains nothing to indicate that land outside of the State was intended. Such a presumption, we have no doubt, will be found to accord with the true intention of the parties in a very large majority of instances in

which the name of the State may be, or may have been, omitted, and, if occasionally there shall prove to be an exception to this rule, it would constitute a mistake which, as between the parties at least, could be corrected, and, in the long run, the ends of justice will be better promoted by this than by the contrary rule.

The case of *Lee* v. *Hills*, 66 Ind. 474, is cited to the point that a correction of such a mistake in a deed or mortgage can not be had. The case, however, is not in point. It has reference to the sale of personal property, and the effort was made in the case, not to obtain a modified description of the goods named in the memorandum, but to procure the insertion of the word *sold*, the effect of which would have been to convert the memorandum into a contract of sale, while, without that word, it contained no evidence whatever of such contract.

That a correction may be had of a deed or mortgage of real estate, in reference to the description of the premises, is too well settled to admit of controversy. *White* v. *Wilson*, 6 Blackf. 448; *Hileman* v. *Wright*, 9 Ind. 126; *Andrews* v. *Andrews*, 12 Ind. 348; *Sample* v. *Rowe*, 24 Ind. 208; *The German, etc., Ins. Co.* v. *Grim*, 32 Ind. 249; *Dice* v. *Morris*, 32 Ind. 283; *Barnes* v. *Bartlett*, 47 Ind. 98; *Busenbarke* v. *Ramey*, 53 Ind. 499; *McKay* v. *Wakefield*, 63 Ind. 27; *Wilson* v. *Stewart*, 63 Ind. 294; *Easter* v. *Severin*, 64 Ind. 375; *Figart* v. *Halderman*, 75 Ind. 564.

There is nothing in the claim that the plaintiff had not capacity to sue, or that there is a defect of parties, because the notes secured by the mortgage were made payable to one Patton as cashier. It was shown that Boyd, to whom, as cashier, the mortgage was made, had succeeded Patton in that office. It is the case of a trustee of an express trust, who may sue in his own name, without joining the *cestui que trust*. Patton, having ceased to be the trustee, had no interest in or relation to the paper, which made him a necessary party. Paper made payable, or indorsed, to the cashier of a bank, is, in legal effect, payable to the bank itself, and in this case the suit

might appropriately have been brought in the name of the bank, though not improperly brought in the name of the cashier. See *Nave* v. *Hadley*, 74 Ind. 155.

There was sufficient evidence in the case to show, *prima facie*, the execution of the mortgage, under the plea of *non est factum*; and, this being so, it was for the jury to decide upon the weight of the conflicting evidence offered on that subject.

All the other questions in the record are made immaterial by our conclusion, that the mortgage contains a sufficient description of the land, and needed no correction, from which it follows that the record of it was notice to the world.

The judgment is affirmed, with costs.

Petition for a rehearing overruled.

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No. 8930.

French, Adm'r, et al. v. The State, ex rel. Manifold.

Supreme Court.—*Weight of Evidence.*—Where there is evidence in the record, which tends to sustain the finding of the trial court on every material point in issue, the Supreme Court will not disturb such finding on the weight of the evidence.

Same.—*Bill of Exceptions.—Omission of Evidence.*—Although the bill of exceptions concludes with the formula, "this was all the evidence given in the cause," yet if, on the face of the bill, there is an apparent omission of evidence, the Supreme Court will not consider or decide any question which depends, for its proper decision, upon the evidence in the cause.

Guardian and Ward.—*Bond.—Reports.—Evidence.*—In an action upon a guardian's bond, where the breach assigned is that the guardian had taken the notes of insolvent persons, without security, for the rents of his ward's real estate, the guardian's reports to the court are competent evidence for the purpose of identifying such notes, which were in evidence, as the notes which had been in the possession of the guardian.

From the Henry Circuit Court.

J. Brown, for appellants.

HOWK, J.—This was a suit by the appellee's relator against the appellants, upon a guardian's bond. The cause was put at issue and tried by the court; and a finding was made for the relator, assessing his damages in the sum of $314.41. The appellants' motion for a new trial having been overruled, and their exception saved to such ruling, the court rendered judgment against them in the relator's favor, for the damages assessed and costs.

The overruling of their motion for a new trial is the only error assigned by the appellants in this court. Under this supposed error the appellants' counsel has devoted the principal portion of his elaborate brief of this cause to the discussion of the alleged insufficiency of the evidence to sustain the finding of the trial court. If the evidence were properly in the record, we could not determine this point in favor of the appellants; for there is evidence contained in the bill of exceptions tending to sustain the finding of the court on every material point. In such a case this court will not weigh the evidence, nor attempt to determine its preponderance in favor of either party. For this purpose, the learned judge who tried the cause had opportunities and facilities which we, as an appellate court, can not have; and it is for this reason that it has been so often decided that this court would not disturb the finding of the trial court or the verdict of a jury upon the weight of the evidence. *Hayden* v. *Cretcher*, 75 Ind. 108.

Besides, although the bill of exceptions, in this case, concludes with the usual formula, "this was all the evidence given in the cause," yet it affirmatively appears on the face of the bill, that it does not contain all the evidence given in the cause. In such a case this court has uniformly held that it would not decide any question which depended for its proper decision upon the evidence in the cause. *Railsback* v. *Greve*, 58 Ind. 72; *Brownlee* v. *Hare*, 64 Ind. 311; *Hammon* v. *Sexton*, 69 Ind. 37; *Fouty* v. *Morrison*, 73 Ind. 333.

In their motion for a new trial, the appellants assigned as

a cause therefor, that "the court erred in admitting in evidence the report and settlement of Howell B. French." Shepherd Manifold, the relator's guardian, whose bond as such was the bond in suit, died in January, 1875, before the relator became of lawful age; and the appellant Howell B. French was the administrator of said decedent's estate. In 1876, one Thomas Sears was appointed and qualified as the guardian of the relator. Afterwards, in August, 1876, French, as the administrator of the deceased guardian, made a written report to the court, in the matter of such guardianship, to the effect that no money, belonging to the relator, had been received by him; but that he had received certain notes and accounts, particularly describing them, which belonged to the relator, and which he had turned over to Sears, the relator's then guardian. This report appeared to have been approved and confirmed by the court. The bill of exceptions in this case shows that, when the relator offered this report in evidence, the appellants objected to its admission on the ground that it was irrelevant and immaterial; and that the court overruled the objection, and admitted the report in evidence, for the purpose only, as stated by the court, of identifying, as it tended to do, the notes which were in evidence, as the notes which French as such administrator had turned over to Sears, as the relator's guardian. It appears, also, that the final report of Sears, the relator's last guardian, was admitted in evidence by the court, over the same objections of the appellants, for the same limited purpose of identifying the notes in evidence, as being the same notes turned over to Sears by the administrator of the relator's first guardian.

We are of the opinion, that these reports were competent evidence for the limited purpose for which the court admitted them; and it can not be supposed that these reports were used, or had any possible effect for any other purpose than the one for which they were admitted.

As the evidence appears in the record, we can not say that the court erred in assessing the relator's damages; nor could

we say so, even if the damages had been assessed at a much larger sum than they were.

We have found no available error, in the record of this cause, for the reversal of the judgment below.

The judgment is affirmed, with costs.

No. 8755.

TOWELL ET AL. v. HOLLWEG ET AL.

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145 535

SUPREME COURT.—*Joint Assignment of Errors.*—Where a joint demurrer by several to a pleading is overruled, an assignment of error by each separately, that the ruling was erroneous *as to him*, presents no question in the Supreme Court.

SAME.—*Complaint.*—The sufficiency of a complaint against two defendants can not be questioned for the first time in the Supreme Court as to its sufficiency as against one only.

CHATTEL MORTGAGE.—*Recording.—Time.*—The time within which the statute requires a chattel mortgage to be recorded, R. S. 1881, section 4913, is computed by excluding the day on which it was executed and including that on which it was recorded.

PRACTICE.—*Special Finding.—Harmless Error.*—Where it appears from the whole record that a particular fact was really not in dispute on the trial, but treated as admitted, it is not essential that the court should, in a special finding of the facts under section 551, R. S. 1881, state such fact.

From the Madison Circuit Court.

E. P. Schlater, C. L. Henry, A. B. Young and *W. S. Diven*, for appellants.

J. W. Baird, H. D. Thompson and *T. B. Orr*, for appellees.

FRANKLIN, C.—This is an action brought by appellees against appellants for the possession of certain goods, and damages for the detention thereof.

Appellants answered separately by denials, and appellant Brown answered specially in a second paragraph, that he held

possession of the property as assignee of Towell, for the benefit of Towell's creditors; that the assignment was executed on the 6th day of January, 1879, duly recorded, and that he had taken possession of the property as trustee under the same; that appellees claimed said property by virtue of a mortgage executed December 28th, 1878, and recorded January 7th, 1879, and that said mortgage was void; copies of both the assignment and mortgage were filed therewith. A separate demurrer of Brown to the complaint, and a demurrer of appellees to the second paragraph of Brown's separate answer, were both overruled, and a reply in denial filed. Trial by court, special finding with conclusions of law, and judgment for appellees.

The errors assigned in this court are:

1st. The complaint does not state facts sufficient.

2d. The complaint does not state facts sufficient to constitute a cause of action against Towell.

3d. Error in overruling Brown's demurrer.

4th. Error in the conclusions of law.

The assignment of errors being joint, the second and third specifications, being separate, can not be considered. As to the first general specification, that the complaint does not state facts sufficient to constitute a cause of action, the imperfections of the complaint have been remedied by a certified copy under a *certiorari*. It is regular in form, in accordance with the statute, and entirely sufficient.

The main controversy between the parties appears to arise under the exception to the conclusions of law upon the special finding. The court found substantially the following facts:

Appellant Towell, on the 28th day of December, 1878, to secure a good-faith indebtedness, executed a mortgage upon the property in controversy to appellees; that the mortgage was duly recorded in Madison county, Indiana, on the 7th day of January, 1879; that on the 6th day of January, 1879, appellant Towell executed an assignment for the benefit of his creditors, to appellant Brown, which was duly recorded,

and under which Brown took possession of the property; upon which, as a conclusion of law, the court found for appellees.

Two objections are presented to this conclusion: 1st, that there was no finding that the mortgagor, at the date of the execution and recording of appellees' mortgage, resided in Madison county, Indiana, and therefore there was nothing to base a conclusion on that the mortgage was valid. The mortgage was made a part of the record by appellant Brown. It stated that the mortgagor was "of Madison county, in the State of Indiana," etc. He was sued in said county, and answered as a resident thereof. There was no controversy in the pleadings or upon the trial, in relation to the residence of the mortgagor, and that it was not essentially necessary for the court to state in its special finding that the mortgagor resided in said Madison county; that was treated during the trial as an admitted fact.

The real controversy appears to be over the second objection, and that is, that the mortgage was not recorded within the time required by the statute; that, in estimating the time within which a chattel mortgage must be recorded, in order to make it valid against third parties, the day upon which it was executed can not be excluded and the day of recording included, but they must both be included. The statute provides that the mortgage shall be recorded within ten days after the execution thereof.

In the miscellaneous provisions of the code, 2 R. S. 1876, p. 311, the 787th section provides, that "The time within which an act is to be done, as herein provided, shall be computed by excluding the first day and including the last. If the last day be Sunday, it shall be excluded."

In the case of *Brown* v. *Buzan*, 24 Ind. 194, it was held that in computing the time in a contract for the acceptance of cattle within eight days from the time of the contract, the day of the contract and that of acceptance must both be included.

In the case of *Tucker* v. *White*, 19 Ind. 253, it was held that

in computing the time of the 180 days' stay of execution, the day on which the judgment was stayed must be included, because execution could have been issued on the day the judgment was signed, and that must be counted as one day. And in the opinion it is added: "This is not a case where the statute requires an act to be done, like the granting of a new trial, for example, within a given number of days." The case in 24th Indiana, *supra*, is based upon this for authority.

In the case of *Noble* v. *Murphy*, 27 Ind. 502, it was held that in cases of appeal from the judgment of a justice of the peace, where the statute required the appeal to be taken within thirty days from the rendition thereof, the general statute excluding the first day and including the last applied.

To the same effect are the cases of *Faure* v. *The United States Express Co.*, 23 Ind. 48, and *Swift* v. *Tousey*, 5 Ind. 196.

In the case of *Hathaway* v. *Hathaway*, 2 Ind. 513, where the statute allowed the justice of the peace to grant a new trial within four days from the rendition of the judgment, in computing the four days it was held that the day on which the judgment was rendered should be excluded; and in the opinion the following language is used: "Had the statute been that a justice might grant a new trial within one day after the rendition of judgment, nobody would have contended that the day on which judgment was rendered should be counted in computing the time. The rule should be the same where the statute requires it to be done within four days."

The same rule has been applied to serving a summons. *Womack* v. *McAhren*, 9 Ind. 6; *Martin* v. *Reed*, 9 Ind. 180; *Blair* v. *Davis*, 9 Ind. 236.

The same rule has been applied to the time of filing bills of exceptions. *The State, ex rel. McCoy*, v. *Thorn*, 28 Ind. 306; *Byers* v. *Hickman*, 36 Ind. 359. Where a thing is required to be done between two specified days, or from one specified day to another, then both are to be excluded. *Cook* v. *Gray*, 6 Ind. 335; *Newby* v. *Rogers*, 40 Ind. 9.

In the former case it was held that "The code provides that

the time within which an act is to be done, as therein provided, shall be computed by excluding the first day and including the last. * But this, as a rule of computation, relates exclusively to statutory time, and does not apply to ordinary contracts."

In the case of *Fox* v. *The Allensville, Center Square and Vevay Turnpike Co.*, 46 Ind. 31, it was held that a "publication made on the 2d of March, for payment on the 1st of April, would, by adopting the ordinary rule of including one of the days and excluding the other, be a publication thirty days before the specified time of payment." It will be observed that this case did not arise under the provisions of the code proper, but the decision of the question is based upon its provisions as the "ordinary rule."

In the case of *Benson* v. *Adams*, 69 Ind. 353, it was held that, in computing the time on a bill of exchange, the day of its execution should be excluded, and the third day of grace included. The court say:

"By section 787 of the code, in all legal proceedings touching the administration of justice in courts, it is enacted that 'The time within which an act is to be done, as herein provided, shall be computed by excluding the first day and including the last.' * * * "This, we believe, is the uniform rule of computing time on a bill of exchange."

In the same case, it was held that a day is a unit of time, commencing at 12 o'clock at night and ending at 12 o'clock at night. That "fractions of a day in statutes, or legal proceedings, or in contracts, are not generally considered; but when the rights of parties depend upon the precedence of time in the same day, or upon a given hour or fraction of a day, it may be alleged or proved, as any other fact."

The statute under consideration, requiring chattel mortgages to be recorded within ten days after their execution, means within ten days after the time of their execution, and that means within ten days after the day of their execution. Therefore, in applying the general tenor of the foregoing decisions of this court to the question under consideration, we conclude that

in the computation of the ten days' time in which a chattel mortgage must be recorded, the day of its execution should be excluded. And as this rule has been established in all cases provided for in the code, it should be made uniform in all cases, except where otherwise expressly provided for by the language used.

We think the mortgage in this case was recorded within the time required by the statute, and was valid.

The court below did not err in its conclusions of law.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be and it is hereby in all things affirmed, with costs.

No. 9354.

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141 307

BUCKLES v. BUCKLES.

DIVORCE.—*Alimony.*—*Supreme Court.*—The Supreme Court will not disturb an allowance for alimony, unless there has been an abuse of discretion by the trial court.

From the St. Joseph Circuit Court.

L. Hubbard, J. B. Arnold and *J. P. Creed*, for appellant.

A. Anderson and *W. G. George*, for appellee.

ELLIOTT, C. J.—Appellant sued for a divorce; the appellee filed a cross bill and the divorce was granted to him.

The appellant claims that the alimony allowed her is insufficient. The amount to be allowed as alimony is very much within the discretion of the trial court, and this court will interfere only in cases where the discretion has been abused. *Powell* v. *Powell*, 53 Ind. 513; *Conn* v. *Conn*, 57 Ind. 323. We have looked into the evidence, and are satisfied that there was no abuse of the discretionary powers vested in the court below.

Judgment affirmed.

No. 8989.

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156 76

HARNESS ET AL. *v.* HARNESS ET AL.

SUPREME COURT.—*Venire de Novo.—Special Verdict.—Harmless Error.*—Where a special verdict is defective, in that it fails to find all the facts necessary to cover the issues, and yet the court below renders such a judgment as would be proper only if the facts not found had been found as the appellant has averred them to be, in his pleadings, he can not complain in the Supreme Court that a *venire de novo* was refused, the error being, in the end, harmless as to him.

From the Howard Circuit Court.

D. P. Baldwin and *D. D. Dykeman*, for appellants.

N. R. Lindsay, M. Bell and *W. C. Purdam*, for appellees.

NIBLACK, J.—Suit by Louisa Harness, Sarah J. Harness, Addison A. Harness, Mary E. Harness, Ida M. Harness, Rosa D. Harness, Margaret Harness, and Thomas Harness, against Benjamin F. Harness, William W. Harness and Lewis W. Harness, for the partition of several tracts of lands, of which Andrew J. Harness, an intestate, died seized. The said Louisa was the widow, and all the other parties were the children of the decedent.

This cause has heretofore been twice before this court. *Harness* v. *Harness*, 49 Ind. 384; *Harness* v. *Harness*, 63 Ind. 1. As there was some amendment in the pleadings after the cause was remanded the last time, we find it necessary to make a brief statement as to the pleadings and issues upon which the last trial was based.

The complaint, amongst other things, charged that the decedent had, in his lifetime, purchased real estate for his sons William and Lewis, of the value of four thousand dollars for each, and had caused such real estate to be conveyed to them respectively, as advancements in full of their shares of his estate. A supplemental complaint was filed alleging that, since the first trial of the cause, Ida M. Harness, one of the plaintiffs, had died unmarried, intestate and without issue, leaving the remaining parties her only heirs at law.

Benjamin F. Harness answered separately, in general denial. The defendants William and Lewis together answered:

1. In general denial.

2. Specially denying that any real estate was conveyed to them or either of them, as an advancement from their father, and averring that the property received by them from him was upon another and different consideration.

3. Averring that the plaintiffs had taken, carried away and converted to their own use timber of various kinds, growing on the lands described in the complaint, of the value of two thousand dollars, which they, said defendants, prayed might be taken into account in making partition of said lands.

The defendants William and Lewis also set up by way of counter-claim, that since the commencement of this suit the said Lewis had purchased and become the owner of all the interest in the lands in the complaint mentioned, which had descended to their co-defendant Benjamin F. Harness.

The plaintiffs replied in denial of the special matters set up as above in defence, and answered the counter-claim, admitting that the said Lewis had purchased the interest of the said Benjamin in the lands, but denying some other things averred in said counter-claim. The cause was tried by a jury and a verdict was returned as follows:

"We, the jury, find for the defendants; that Andrew J. Harness purchased with his own means, and caused to be conveyed to defendants William W. Harness and Lewis W. Harness, each a farm of the value of four thousand dollars; that the same was intended as a gift to them and not as an advancement. We further find that the defendant Lewis W. Harness has purchased and is the owner of the interest of Benjamin F. Harness in said real estate, and that partition be had accordingly."

The plaintiffs thereupon moved the court for a *venire de novo*, upon the alleged grounds that the verdict, returned as above, did not cover all the issues involved in the cause, and

that such verdict was not sufficient to authorize the rendition of a judgment of partition thereon, but their motion was overruled.

The court then decreed that partition be made in substantial accordance with the prayer of the complaint, except that the lands received by the defendants William and Lewis, from their father, were not taken into account as advancements, and portions of the lands ordered to be divided were directed to be set off to them in the same manner as to the other surviving children of the decedent, and partition was made accordingly.

The plaintiffs have appealed and assigned error upon the refusal of the court to grant a *venire de novo*.

The verdict in this case was quite informal and in many respects, at least, technically insufficient as against any of the parties in a condition to complain of it.

The court below might, with propriety, have issued a *venire de novo* instead of rendering judgment on the verdict, but are the appellants in a position to complain of the action of the court in that respect, conceding it to have been somewhat questionable and irregular?

The evidence is not before us, but there is enough in the record to indicate that the principal and, indeed, only real contest at the trial, was whether certain advancements had been made to the appellees William and Lewis, by their father, as charged in the complaint. All the other allegations of the complaint appear to have been practically admitted, either by the pleadings, or at the trial, and the verdict was seemingly framed, and the decree of partition rendered, upon that theory.

The verdict must be considered, what it was doubtless intended to be, a special verdict, and on the subject of the alleged advancements it found specially against the appellants.

As has been said, the decree of partition was in substantial accordance with the prayer of the complaint, except in so far

as the jury had specially found certain facts alleged in it not to have been sustained by the evidence.

In other words, upon all questions as to which it is complained there was either no finding, or a defective finding, the decree was in favor of the appellants.

We are therefore of the opinion that whatever defects there may have been, abstractly considered, in the verdict, such defects were, as to the appellants, cured by the decree of partition and subsequent proceedings under it, and, as no one else has objected, there is no reason for disturbing the judgment.

Other questions are incidentally discussed by counsel, but they are not presented in such a way as to require us to consider them.

The judgment is affirmed, with costs.

No. 9231.

Easter v. Acklemire et al.

Supreme Court.—*Dismissal.—Waiver.*—A motion to dismiss an appeal after submission, on account of the non-joinder of a party defendant in the appeal, and want of notice served, can not prevail; such objections are considered waived by the submission.

Appeal Bond.—*Approval.—Waiver.—Pleading.—Principal and Surety.*—The approval of an appeal bond may be waived by agreement of the parties, and a complaint in an action on such bond, which avers that the penalty was fixed by the court, that the bond was filed within the time fixed by the court, that the approval of the security by the court was waived, and that proceedings were stayed on the judgment during the pendency of the appeal, is sufficient on demurrer.

From the Clay Circuit Court.

J. A. McNutt, for appellant.

T. W. Curtis and *E. S. Holliday*, for appellees.

FRANKLIN, C.—This action was brought by appellees against appellant and one Henderson, on a Supreme Court appeal bond.

Appellant demurred to the complaint. The demurrer was overruled, and an exception reserved. The ruling upon the demurrer is the only error assigned.

The cause was submitted in this court May 20th, 1881.

On the 5th of October, 1881, appellees filed a motion to dismiss the appeal, for the reason that Henderson, the co-judgment defendant, did not join in the appeal, and was not made an appellee in the assignment of errors, with the proper notice served upon him.

In the recent decisions, this court has been holding that these preliminary questions, not affecting the merits of a cause, are waived by not being made before the submission. Therefore, the motion to dismiss the appeal should be overruled.

The objections to the complaint are, that it shows that the bond was not approved by the court, and the time given in which to file it was left blank in the record entry giving the time.

It is insisted that the provisions of the statute were not complied with in the giving of the bond, and that it is, therefore, invalid, and can not bind appellant as surety thereon.

It is alleged in the complaint, that the approval of the security by the court was by agreement waived, and that the bond was filed within the time allowed by the court.

But it is insisted by appellant, that the approval of the security by the court could not be waived, and in support thereof we are referred to the case of *Ham* v. *Greve*, 14 Ind. 531.

In that case the complaint did not show that the penalty of the bond was fixed by the court, or that the court directed in what time the bond should be filed, or that it was filed within the time directed, or when the transcript was filed, nor was it alleged that execution and other proceedings were stayed upon the judgment below during the pendency of the appeal in this court, for which omissions the complaint was held bad. In the case under consideration, the complaint contains sufficient

averments in relation to each one of said omissions, and avers an express waiver of the court's approving the security, which make the complaint good according to the case above cited.

In the case of *Jones* v. *Droneberger*, 23 Ind. 74, it was held that "the object and effect of the bond were, or were intended to be, to stay execution on the judgment below, and make the appellee secure during the pendency of the appeal. The bond was for the individual benefit of the appellee; and the provisions in the statute requiring the court to approve it in term time, and the clerk in vacation, were inserted for the purpose of securing a good bond for the appellee, and of creating an arbiter to decide between the parties where they might not be able to agree as to what, in the given case, was a good bond; and the question is, can not the parties waive the approval of the court or clerk in any given case, where their own individual interests are alone at stake, and mutually agree upon a bond? If they can, and do so, the bond given in such case is valid. Delay of execution is a good consideration for the bond. And if they can make such waiver, we must presume it was shown to have taken place in this case, in the original suit on the bond, as the evidence is not in the record, and all presumptions must be in favor of the judgment. We think the waiver could be made." See, also, *Smock* v. *Harrison*, 74 Ind. 348.

In the case at bar, the record shows that time was given by the court within which to file the bond, but the number of days was left blank; the complaint avers that it was filed within the time fixed by the court and, with the allegation of an express waiver by the parties of the approval of the security by the court, we think the complaint stated sufficient facts to constitute a good cause of action, and that there was no error in overruling appellant's demurrer to it.

The judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be and it is in all things affirmed, with costs.

No. 8776.

City of Lafayette v. Allen.

81	166
129	330
81	166
152	25
81	166
e167	146

Negligence.—*City.—Complaint.—Knowledge of Defective Machinery.—Personal Injury.*—Complaint by an employee against a city for personal injury, averring that the injuries resulted from defects in a fire engine of which he had charge, which were known to the defendant and unknown to the plaintiff. It was objected on demurrer that it should have been alleged that the defects were known to some proper officer of the city. *Held*, that the objection was insufficient.

Special Verdict.—*Venire de novo.—Practice.*—No finding should be made in a special verdict as to facts upon which there was no evidence, but an issue on which no facts are found should be regarded as not proved by the party having the burden of that issue, and silence as to such issue is not ground for a *venire de novo.*

Same.—*New Trial.*—If a special verdict ought to have found facts which are not found, the remedy is by motion for a new trial, on the ground that the verdict is contrary to law.

From the Tippecanoe Circuit Court.

J. A. Stein, R. P. Davidson and *J. C. Davidson*, for appellant.

R. P. DeHart, J. R. Coffroth and *T. A. Stuart*, for appellee.

Bicknell, C. C.—This was an action by the appellee against the appellant, to recover damages for personal injuries.

The complaint avers that the appellant employed the appellee as an engineer, and put him to work upon one of her steam engines, which was old, worn-out, defective, and dangerous, and was known to be such by the appellant; that the appellee went to work with the engine, pumping up water for the appellant's water pipes, without knowledge of any defect in the engine, and without any fault on his part, and was badly burned and crippled for life, by the bursting of the boiler, which happened in consequence of the said defective, worn-out and dangerous condition of the engine.

A demurrer to this complaint, for want of facts sufficient, etc., was overruled, and this is one of the errors assigned by the appellant.

The principal objection made to the complaint is, that the appellant, being a corporation, could not have any knowledge except by its servants or agents, and that the complaint ought to have averred knowledge of the defective condition of the engine, by some proper officer or agent of the corporation. No authority is cited in support of this proposition, and none can be found. The complaint was sufficient; there was no error in overruling the demurrer to it; the knowledge of the appellant, and the absence of all fault in the appellee, were sufficiently averred. *Ohio, etc., R. W. Co.* v. *Collarn*, 73 Ind. 261.

A general denial was the answer filed; the issue was tried by a jury, who returned the following special verdict:

"We, the jury, having been required to find a special verdict, do find the facts in said cause as follows:

"1. The defendant is now, and has been for years, a municipal corporation, organized under the act of the Legislature, passed March 14th, 1867, entitled an act to provide for the incorporation of cities, etc.

"2. The defendant had a fire department prior to 1873, under the control of a chief engineer, appointed by the defendant, and all the workmen in that department were under the control of said chief engineer; Woodward Porter was chief engineer from May, 1873, to May, 1875, and ever since the last date, George W. Kensinger has been chief engineer.

"3. On May 13th, 1879, the plaintiff was employed by defendant as engineer of steam fire engine 'Lafayette, No. 1,' kept at the Ninth street engine-house, and for twenty years had been a competent, skilful, careful and efficient engineer, well trained and skilled in the management, use and operation of steam machinery.

"4. On May 26th, 1879, defendant owned two steam engines, the 'Lafayette, No. 1,' bought in 1876, and the 'Tippecanoe, No. 2,' bought in 1865; the latter was kept at the Columbia street engine-house, and had been kept there since the purchase of the other engine, and was only used occasionally; for ten months before the explosion it had been used

only once, and then it blew out a flue, and the steam-gauge was out of order, and would not properly measure the steam. These facts, long before the explosion, were known by the chief engineer; on said 26th of May, 1879, the boiler of steam engine No. 2 was old, weak, rusted, defective and dangerous, and its steam-gauge would not accurately indicate the amount and pressure of steam, and all this had been communicated to said Woodward Porter, chief engineer, in his time, and also to said George W. Kensinger, his successor, and also to several members of defendant's common council, and both Porter and Kensinger had knowledge of said defects, long prior to said May 26th, 1879.

"5th. For more than a year before the explosion, the common council of defendant knew that said boiler was old, worn and unsafe.

"6th. Said common council knew that said engine No. 2 was kept for use, and was used by the chief engineer, as occasion might require, up to and including the time of said explosion.

"7th. Said defendant did not cause any examination or inspection of said boiler to be made for several years prior to said explosion.

"8th. The plaintiff knew nothing of the condition of said steam engine, boiler or gauge, and had never used the engine before.

"9th. At 5:30 o'clock P. M., of said May 26th, the plaintiff was ordered by said chief engineer to take said engine and pump water from a cistern into defendant's water pipes; the engine was brought to the cistern under the direction of the chief engineer, who came with it, and ordered the fire to be lighted; that the plaintiff supposed the engine to be all right and fit for use, and knew nothing of its dangerous condition, and under the order of said chief engineer did, in a careful and skilful manner, and without any fault or negligence on his part, or on the part of his co-servant Taylor, begin to run said engine; that he soon saw that by the indication of the steam-

gauge, there was not enough steam made, and on examination discovered that the attachments to the lever of the safety valve were so out of repair, that the steam was escaping from the safety valve; that the gauge then indicated twenty-two and a half pounds pressure, and while plaintiff was trying to fix said attachments, without any fault or negligence of him or his co-servant contributing thereto, said boiler blew up, in consequence of the old, weak, worn and dangerous condition of the same.

"10th. By said explosion, the plaintiff was badly injured; three of his ribs were broken; he was badly burned, scalded, bruised, and injured in his eyes, and on his ears, face, legs, arms and hands, so that he will not for a long time, if ever, recover from the said injuries; his nervous system was greatly shocked, and his eyesight and hearing impaired; he suffered great pain, and his recovery for a long time was considered doubtful; he has been unable since to do any work; prior to that time he could and did earn about $100 a month, which is what men of his skill and experience usually earn in his occupation.

"11th. He incurred liability in procuring the services of a physician in attempting the cure of his injuries in the sum of $100.

"Upon these facts, if the law is with the plaintiff, we find for the plaintiff and assess his damages at $3,800; and if the law is with the defendant we find for the defendant."

The appellant moved for a *venire de novo*, because said verdict does not fully state the facts within the issue, and because the jury failed to find the following facts which were fully and fairly within the evidence and were material to the issue to wit, etc.: (The statement of the facts in said motion for a *venire* need not be here repeated.) This motion was overruled, and such overruling is one of the errors assigned by the appellant, but the court committed no error therein. The facts, to be stated in a special verdict, are those proven on the trial; if there were issues on which no evidence was offered, no finding should be made upon them, and issues on which no facts are found should be regarded as not proved by the party

on whom the burden lay of proving such issues. It is not the office of a special verdict to find expressly upon the issues, but to find the facts proven within the issues; therefore, if the special verdict is silent as to any fact or issue, such silence is not an omission apparent on the record which can be ground for granting a *venire de novo*. If the verdict ought to have found facts which are not found, the remedy is by motion for a new trial, on the ground that the verdict is contrary to law. *Ex Parte Walle*, 73 Ind. 95; *Graham* v. *The State, ex rel.*, 66 Ind. 386; *Martin* v. *Cauble*, 72 Ind. 67; *Vannoy* v. *Duprez*, 72 Ind. 26; *Parker* v. *Hubble*, 75 Ind. 580.

The appellant then moved for a new trial for the following reasons:

1. The verdict is not sustained by sufficient evidence and is contrary to the evidence.

2. The verdict of the jury is contrary to law.

3. Errors of law occurring at the trial and excepted to by appellant, embracing twenty-three specifications.

The overruling of this motion is also assigned as error; but there is no discussion of this matter in the appellant's brief; all that the appellant says is this: "We ask especial attention to the errors of law committed in overruling said motion." There are two other assignments of error which are not argued, namely, the second, which relies on the overruling of appellant's motion that the court require the jury to consider further the verdict and find more fully the facts, and the fifth, which relies on the overruling of the appellant's motion in arrest of judgment. Errors assigned but not argued are regarded as waived. *Payne* v. *McClain*, 7 Ind. 139; *The City of Greencastle* v. *Martin*, 74 Ind. 449.

All the other errors assigned have already been considered; there is no available error in the record. The judgment of the court below ought to be affirmed.

Per Curiam.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellant.

No. 8707.

Stagg v. Compton.

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Practice.—*Motion for New Trial.—Bill of Exceptions.*—The motion for a new trial and exception to the ruling thereon may be made a part of the record by a bill of exceptions.

Same.—*Stenographer's Report of Evidence.*—A stenographic report of the evidence, embodied in a bill of exceptions, followed by a statement that that was all the evidence given in the cause, shows the evidence, though it do not appear that the stenographer was sworn.

Contract.—*Offer of Sale and Acceptance by Letter.—Parol Evidence.*—In an action for the price of a horse alleged to have been sold by the plaintiff to the defendant, the plaintiff, admitting that he had sent a letter to the defendant containing an offer to sell him the horse for two hundred dollars, offered in evidence a letter, afterwards received from and signed by the defendant, of the tenor following: "I might purchase your horse at $200—the price you asked. I would like to get it at once, if it will do me, which I am quite certain it will. Please reply at once."

Held, that the two letters do not show a complete written contract for the sale of the horse, and that the one offered was competent evidence, in connection with parol evidence offered, to show the sale charged.

From the Marion Superior Court.

W. Morrow, for appellant.

A. B. Young, for appellee.

Woods, J.—The appellant brought the action, alleging, in his complaint, that the appellee was indebted to him in the sum of two hundred dollars, the price of a horse sold and delivered to the appellee, at his special instance and request. The court rendered a finding and judgment for the defendant, which, at the general term, was affirmed. The appellant insists that the court erred in excluding certain evidence offered by him.

The appellee insists that the question sought to be presented is not before the court, because the motion for a new trial and the evidence in the case are not in the record.

The transcript contains an order book entry, which shows the filing and overruling of the appellant's motion for a new trial, and his exception to the ruling, but, instead of copying

the motion at this place, the clerk has noted "(Inserted in the bill of exceptions hereinafter copied. See page —, line —, of this transcript)." A bill of exceptions was filed within the time limited by the court and in that the motion for a new trial is set out, and a statement made of the ruling of the court thereon, and of the appellant's exception to the ruling.

It is true, as counsel say, that a motion for a new trial is a part of the record, without the aid of a bill of exceptions, and the ruling of the court upon the motion and the exception thereto may be shown by an order-book entry; but, nevertheless, a bill of exceptions is a competent and proper, though needlessly cumbersome, way of making up the record of the ruling on such motion.

In reference to the evidence, the bill of exceptions contains the following recital: "Whereupon the plaintiff, to prove the burden of the issue on his part, introduced the following evidence, to wit: So much of the evidence of Charles W. Stagg, taken down by Charles D. Johnson, an official stenographer, as was admitted by the court, is as follows:" Here follows a statement of the evidence, certified by the reporter as "all that was offered and introduced on the trial of said cause." From this point the bill of exceptions proceeds to state the offers of the appellant to introduce other evidence, the rulings of the court and the appellant's exceptions, followed by the statement, "which was all the evidence given and offered in the cause;" and following this the filing and overruling of the motion for a new trial, etc., all signed by the judge who presided at the trial.

It is objected that the record does not show that the reporter was appointed and sworn.

As the record comes before us, the objection is immaterial. The evidence is embodied in the bill of exceptions, is authenticated by the signature of the judge, under the statement already quoted, showing that it was all the evidence given or offered. It is the same, therefore, as if there had been no reporter, and as if the bill of exceptions had been made up in the usual way,

without reference to the fact of there having been a stenographic report.

This brings us to the real question in the case. The plaintiff offered in evidence the following postal card, having first given evidence that it was in the handwriting of the defendant, and had been received by the appellant through the post-office at Hot Springs, Arkansas, to wit:

"INDIANAPOLIS, March 16, 1878.

"CHAS. W. STAGG, Hot Springs, Arkansas:

"I think I might purchase your horse at $200, the price you ask me. How can I get it? I would like to get it at once, if it will do me, which I am quite certain it will. Please reply at once, and oblige, Yours Truly,

"A. B. COMPTON."

Counsel for the appellee objected to the reading of this card in evidence without the introduction of the letter to which it was a response; and thereupon, in answer to a question by the court, the appellant, who was under examination as a witness, said there had been "one letter in which the proposition referred to in that was made." The court then enquired whether steps had been taken to secure the original letter, and, being informed that none had been taken and no notice to the defendant to produce had been served, the court sustained the objection. The plaintiff excepted to the ruling, and offered to prove conversations had by him with the defendant, prior to the receipt of the postal card, in relation to the sale of the horse, at the price of $200; but, upon objection that the conversations were merged in the writing, the court excluded the testimony. It was then shown that no correspondence in reference to the sale of the horse passed between the parties after the postal card, and, Wilson Morrow having been called and sworn as a witness, the appellant offered to prove by him "that he received the postal card offered in evidence, addressed to Chas. W. Stagg and signed by the defendant, about the first of April, 1878, and called upon the defendant with the card,

and delivered to the defendant the horse, and received from him the receipt now offered in evidence:

"'To Mr. Morrow, Indianapolis:

"'April 6th, 1878.—I have received Charles W. Stagg's horse and paid the charges on the same, which was six dollars.

"'Yours Truly, A. B. Compton.'"

This was excluded by the court, and, the plaintiff excepting offered to prove further by the same witness, "that he stated to Mr. Compton, at the time he presented the postal card, that he was authorized to let him have the horse upon his paying the charges, and asked him for a receipt; that Mr. Compton refused to give a receipt for the horse until he saw the horse; that some days afterwards he gave to the witness the receipt offered in evidence, stating that he received the horse and had paid the charges." This testimony the court also excluded, and the appellant excepted.

The court, both at special term and at the general term, it seems, acted upon the theory that it was apparent that the parties had made a contract in writing, if any contract at all, for the sale of the horse, consisting in the letters which had passed between them, and that it was not competent for the plaintiff to offer the postal card by itself, but only in connection with the letter of the plaintiff to the defendant, which preceded the postal card. In the opinion of the majority of the court, at the general term, it is said: "It is clear from the quotations made from the record, that the contract for the sale of the horse was made by the correspondence between the parties. According to the plaintiff's testimony, a letter of his proposed the price, and the postal card, which terminated the correspondence, contained an acceptance of this written proposition; so that both proposition and acceptance were in writing, the contract was complete, and, being complete, the writings, and the writings alone, can prove the said agreement. The contract did not rest partly in parol and partly in writing, but was all in writing."

If we were able to concur in this construction of the facts

proven and the evidence offered, it is probable that we could not dissent from the final conclusion reached by the superior court; but our judgment is that the evidence did not show a contract in writing. It is conceded that the postal card, which was offered, was the last written communication between the parties; and it is quite clear that if nothing further had occurred, there would have been no sale, nor contract for the sale of the horse. By that card, the defendant said: "I think I might purchase your horse at $200, the price you ask me. How can I get it? I would like to get it at once, if it will do me, which I am quite certain it will. Please reply at once and oblige." Now, if the plaintiff had replied, by letter, directing the defendant to take the horse at the price named, and telling him when and how he could get it, there would still have been no completed contract, because, by the terms of his postal card, the defendant was entitled to determine whether the horse would suit him. The plaintiff, however, did not answer the defendant's last letter, but sent it, as it was proposed to prove, to his attorney or agent, Morrow, with authority to deliver the horse to the defendant, if he would pay certain charges to the amount of six dollars; and, acting upon this authority, Morrow carried the postal card to the defendant, communicated his authority, delivered the horse, which the defendant accepted, and receipted for, and paid the stipulated charges. Without these transactions there was no contract; with them, there was a contract, or, at least, such evidence as would have warranted the court in finding a contract, such as was declared upon. The proffered evidence ought, therefore, to have been admitted.

The contract was not entirely a written contract. The postal card was not the acceptance of a proposition, but was itself a proposition, though not an absolute one. The plaintiff having sent it to his agent, with the direction to let the defendant have the horse upon paying the charges, and the horse having been delivered and accepted accordingly, the letter was an important memorandum of the terms of the contract, though

it was essentially a parol contract. *Board, etc.*, v. *Shipley*, 77 Ind. 553. There is nothing in this letter which indicates that there had been any antecedent correspondence between the parties, and, while the plaintiff's testimony shows that there had been such correspondence, there is nothing to indicate, that, if produced, it would have had the slightest bearing upon the rights of the parties. If it had any significance whatever, it was in the possession of the defendant, and the privilege was his to produce it for whatever advantage it could afford him. At most, it could be evidence, not of a written, but only of the parol, contract of the parties; and, this being so, it is clear that the plaintiff was entitled to the evidence which he offered, without offering or having taken steps to procure the production or to prove the contents of the other letter. See the following authorities: Wharton Evidence, sections 61, 617, 1103; *Barrymore* v. *Taylor*, 1 Esp. 326; *Walson* v. *Moore*, 1 C. & K. 626; *DeMedina* v. *Owen*, 3 C. & K. 72; *Lester* v. *Sutton*, 7 Mich. 329; *Wells* v. *Milwaukee, etc., R. R. Co.*, 30 Wis. 605; *Trischet* v. *Hamilton, etc., Ins. Co.*, 14 Gray, 456; *Stone* v. *Sanborn*, 104 Mass. 319; *Wiggin* v. *Boston, etc., R. R. Co.*, 120 Mass. 201; *Thomas* v. *Dering*, 1 Keen, 729.

The judgment is reversed, with costs, and with instructions to grant a new trial.

ELLIOTT, C. J., did not participate in this decision.

No. 9243.

THOMPSON ET AL. *v.* BODEN.

PROMISSORY NOTE.—*Principal and Surety.—Extension of Time.—Principal's Insolvency.—Evidence.—Payee's Knowledge.*—On trial of an action on a note against principal and surety, wherein the surety has answered an extension of time, a question to the payee, a witness, asking his reason for not giving an extension, and his answer thereto that he knew of the principal's insolvency, were relevant, competent and material.

Thompson *et al.* v. Boden.

PRACTICE.—*Objection to Question.—Evidence.—Supreme Court.*—An objection to a question put to a witness can not be made for the first time in the Supreme Court.

INSTRUCTION.—*Erroneous Conclusion.*—An instruction which, having stated a part only of the evidence given relative to the issue, concludes: "your finding should be for the plaintiff," is erroneous.

From the Hamilton Circuit Court.

A. F. Shirts, G. Shirts and *W. R. Fertig*, for appellants.

W. Garver and *R. Graham*, for appellee.

FRANKLIN, C.—Appellee sued appellants on a promissory note; Thompson was principal and Shumaker surety. Appellants answered separately. Thompson answered, that by agreement, for a valuable consideration, to wit, $2.00, the time of payment was extended for one year from the 24th day of August, 1879, which time had not expired at the commencement of this suit. Which answer in abatement was sworn to. Appellee replied in two paragraphs: 1st. Denial. 2d. That the endorsement on the note, "for extension for one year $2.00," was fraudulently placed there by appellant Thompson, without appellee's knowledge or consent.

Appellant Shumaker answered in three paragraphs: 1st. That he was surety, and that appellee, by agreement with Thompson, the principal, in consideration of one dollar, without his knowledge or consent, extended the time of payment for one year from the 24th day of August, 1878, and that he was thereby released as surety. The second was similar, for extending the time, in consideration of two dollars, for one year from the 24th of August, 1879. The third was similar, for extending the time of payment for one year, in consideration of the payment of interest in advance. To all of which appellee replied by a denial. Trial by jury; verdict for appellee, and, over a motion for a new trial, judgment was rendered for appellee.

In the appeal to this court, there is no assignment of errors on the part of Thompson, and his pleadings will not be further

noticed. The only error assigned by appellant Shumaker is in overruling his motion for a new trial.

The reasons stated in the motion for a new trial are:

1st. The illegal admission of testimony.

2d. Refusal to strike out illegal testimony.

3d. Error in instructions to the jury.

4th. The verdict was not sustained by sufficient evidence, and was contrary to law.

The first and second specifications present the same question, and may be considered together. The testimony complained of consisted of the following question, asked appellee while on the witness stand, and, after an objection being overruled, by him answered: "I will ask you what reasons you have, if any, for not giving an extension; you knew about Thompson's circumstances at the time, did you not?" Answer. "I knew; I had been told, and was certain he was insolvent, and was not worth it; I knew that at the time." The objection to this question and answer made at the time, was, "that it was irrelevant, incompetent, and immaterial."

The witness had just before testified that he had never made any agreement with Thompson for any extension of time; that nothing was ever said between them in relation to extending the time of payment; that the interest was always paid after due, never in advance; that in 1878, in addition to the interest then due, Thompson gave him $1.00, for, as he said, being kind to him and indulging him; that Thompson gave to him $2.00 in 1879, in the same way; that Thompson each year made the endorsement on the note of the payment of the interest; the amount was sixty dollars per annum, and without his knowledge or consent, he being unable to read on account of his not having his spectacles with him, in 1879, Thompson, in addition to endorsing the interest paid, endorsed also on the note "for extension of one year $2," and that Thompson did not read the endorsement for extension to him. The testimony objected to might materially affect the former evidence of the witness. We do not think that it was "irrele-

vant, incompetent or immaterial." The objection urged in this court is that the question was too leading. The latter part of it was, indeed, very suggestive. But had that objection been made in the court below, the court could have remedied the error, and required the question to be properly asked before it was answered, or refused it entirely, after its having been put in such a leading form. This objection, not having been made in the court below, ought not, for the first time, to be urged in this court. *Bruker* v. *Kelsey*, 72 Ind. 51; *The City of Huntington* v. *Breen*, 77 Ind. 29. There was no available error in the admission of this testimony, or in the overruling of the motion to strike it out.

The third error assigned is in relation to the instructions to the jury.

We see no reasonable objection to the giving of the first instruction asked by appellee.

The second one asked reads as follows: "If the jury believe, from the evidence, that the endorsement on the back of the note in controversy 'for extension of one year $2,' or the endorsement of any sum on the said note, as for any extension of time, was made fraudulently and without the knowledge or consent of the plaintiff, then, and in that case, the plaintiff is not bound by such endorsement, and your finding should be for the plaintiff."

This instruction would have been all right, if the conclusion had been omitted. That does not, necessarily, follow the main instruction. The only issue presented upon the endorsement on the note was in the reply to Thompson's answer. There was no such issue presented on Shumaker's answer, and the instruction covered Shumaker's defence the same as Thompson's.

But both of their answers plead the agreement for extension as a defence, and are not based upon the endorsement on the note. If the endorsement was fraudulent and void, and appellee was not bound thereby, still appellants had the right to prove the agreement, otherwise than by the endorsement

upon the note. And the record shows that other evidence than the endorsement on the note was given upon the subject of the agreement. This instruction took all the other evidence of the agreement away from the jury. The testimony was conflicting; Thompson swearing that there was such an agreement, and Boden swearing that there was not such an agreement, thereby presenting an issue of fact, the decision of which the court had no right to withdraw from the jury, by instructing them to find for the plaintiff, if the endorsement upon the note was fraudulent. We think this instruction was not applicable to the issue presented by appellant Shumaker's defence, and well calculated to mislead the jury and prevent them from properly considering all the evidence applicable to the issues in his defence; and that the giving of the instruction was erroneous, for which a new trial ought to have been granted.

The court below erred in overruling the motion for a new trial, for which the judgment must be reversed, as to Shumaker.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below, as to appellant Shumaker, be and the same is in all things reversed, at the costs of the appellee, and that the cause be remanded with instructions to the court below to grant to appellant Shumaker a new trial, and for further proceedings.

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No. 9156.

SLOAN v. SEWELL.

PRACTICE.—*Objection to Evidence.*—No other objections to the admission of evidence than those stated to the trial court will be considered on appeal.

TAX SALE.—*Description of Land Sold.*—*Enforcement of Lien.*—Where the description in the certificate and deed of the real estate sold for delin-

quent taxes, is such as would enable a competent person to identify and locate the particular land intended to be conveyed, it is sufficient to entitle the purchaser to enforce a lien against the land for the principal, interest and penalty of the sum paid by him.

SAME.—*Imperfect Description.*—The fact that land subject to taxation is imperfectly described will not preclude the purchaser at the tax sale from maintaining an action to enforce a lien against the land intended to be listed and sold.

SAME.—*Lien Where Owner Has Personal Property.*—The fact, that the owner of real estate sold for delinquent taxes had personal property in the county subject to sale, will not prevent the purchaser from obtaining a lien on the land for the amount paid by him, including terest and penalty.

From the Fountain Circuit Court.

J. B. Martin and *S. F. Wood,* for appellant.

H. H. Dochterman, for appellee.

ELLIOTT, C. J.—The only questions which require consideration are those arising upon the ruling denying a new trial.

The claim of the appellee, who was the plaintiff below, is for money paid to the county officers upon property purchased by him at a tax sale. The court refused to decree title in him, but did adjudge that he was entitled to enforce a lien against the land of the appellant, for the principal, interest and penalty of the sum paid by him. In support of his complaint, the appellee introduced in evidence, a certificate and deed issued to him by the county auditor. A single objection was made to their introduction, and this is the only objection which can be considered here. It is a familiar rule of practice, that no other objections than those stated to the trial court can be considered on appeal. The objection stated was, that the description contained in the certificate and deed was so imperfect as to be void. We can not regard the description as so insufficient as to render the instruments entirely void, and the objection does not present any question of variance between the description stated in the complaint and that set forth in the instruments offered in evidence. The description is such as would enable a competent person to identify and locate the

particular land intended to be conveyed, and this would save it in any case, certainly in a case where only a lien is declared for taxes paid by the party asserting the claim. As will be hereafter shown, a very liberal rule applies to such cases as the present. Descriptions not more accurate have been sustained even where the party was undertaking to build an absolute title upon them. Cooley Taxation, 282, 285; *Gilman* v. *Riopelle*, 18 Mich. 145; *Major* v. *Brush*, 7 Ind. 232; *The Jordan, etc., Association* v. *Wagoner*, 33 Ind. 50.

The fact, that the appellant had personal property, does not preclude the appellee from enforcing against the real estate a lien for the taxes paid by him. The fact that the taxpayer had personal property within the county, subject and open to seizure, might prevent the purchaser at the tax sale from acquiring a title, but it will not prevent him from obtaining a lien on the land for the principal, interest, and penalty of the taxes paid by him. *Bender* v. *Stewart*, 75 Ind. 88; *Hosbrook* v. *Schooley*, 74 Ind. 51; *Ward* v. *Montgomery*, 57 Ind. 276; *McWhinney* v. *Brinker*, 64 Ind. 360. The statute expressly creates and provides for the enforcement of a lien in such cases. *Flinn* v. *Parsons*, 60 Ind. 573.

The fact, that the land subject to taxation is imperfectly described, will not preclude the purchaser at the tax sale from maintaining an action to enforce a lien against the land intended to be listed and sold. *Cooper* v. *Jackson*, 71 Ind. 244; *Flinn* v. *Parsons*, *supra*. A taxpayer ought to know the description of his own property, and if he finds it imperfectly described, there is ample provision for remedying the defect. He should not be allowed to escape the burden of taxation upon the ground that there is a defect in the description of his property. *Noble* v. *City of Indianapolis*, 16 Ind. 506; *Ronkendorff* v. *Taylor*, 4 Peters, 349; *Woodside* v. *Wilson*, 32 Pa. St. 52.

We find no error in the record, and therefore affirm the judgment.

No. 9192.

Davis *v.* Nicholson, Trustee.

Highway.—*Obstruction.*—*Vacation.*—A public highway is not vacated by the temporary turning out of travel from the main track and the use of adjoining land temporarily to avoid an obstruction.

Same.—*Penalty.*—*Obstruction by Felling Tree.*—Such temporary divergence will not excuse the felling of a tree across the obstructed main track, in violation of section 24, 1 R. S. 1876, p. 860; R. S. 1881, section 5082.

Supreme Court.—*Conflicting Evidence.*—*Verdict.*—*Preponderance.*—The Supreme Court will not disturb a verdict which is supported by some evidence, however great the preponderance may have been the other way.

From the Madison Circuit Court.

C. L. Henry and *W. L. Diven*, for appellant.

W. R. Pierse and *C. B. Gerard*, for appellee.

Morris, C.—This suit was commenced by the supervisor of road district No. 6, of Green township, Madison county, Indiana, in the name of the trustee of said township, against the appellant, before a justice of the peace, pursuant to section 24 of the act in relation to the election or appointment of supervisors, etc. 1 R. S. 1876, p. 860.

The complaint charges, that on the 26th day of January, 1880, and on each and every day from that day until the 12th day of February following, the appellant entered upon that portion of a public highway used for more than twenty years as such, running and passing through the northwest quarter of the southwest quarter of section 27, in said township, and then and there, during said time, unnecessarily and to the hindrance of passengers on said highway, obstructed said highway, so that travellers along and upon the same could not pass over and by said obstructions, by cutting down upon and across said highway, at the point named, trees, limbs and brush, and suffering the same to remain on said highway during the time aforesaid. The location of the highway is particularly and sufficiently described. The appellee demanded judgment for $85.

The cause was tried before the justice, who gave judgment for the appellant. The appellee appealed to the circuit court, where the cause was tried before a jury, who found for the appellee. The appellant moved for a new trial; the motion was overruled and the appellant excepted.

The error assigned is the overruling of the appellant's motion for a new trial.

The appellant insists that the verdict of the jury was not sustained by sufficient evidence; that the testimony failed to show that the highway had, as alleged in the complaint, been used by the public for twenty years; that there was no evidence fairly tending to prove that the appellant had obstructed the highway unnecessarily and to the hindrance of travellers upon it. The evidence is very conflicting and the weight of it may have been opposed to the verdict; but there was, we think, some testimony legally tending to support the verdict. That being the case, this court can not disturb the verdict, however great the preponderance of the evidence may have been the other way. *Hayden* v. *Cretcher*, 75 Ind. 108, and cases there cited.

Carlos Savage testified that he lived in Green township, Madison county, Indiana, and within a short distance of the road; that he had resided there since he was nine years old; that he was acquainted with the road in dispute, and that it runs through that part of section 27, in said township, alleged to have been obstructed, and between his land and that of John Remier and David Richards; that the width of the road is about thirty feet. He also stated that the road east of Davis' land had been changed by petition, as he supposed; that the new or changed part of the road varied from the old road for the distance of about thirty-five rods, and then came back into the old road and run west on the section line. He also testified that he had known the road for twenty-six or twenty-seven years; that a coffee-nut tree had been felled across the road on what was called the appellant's land, and also that two hickory trees had been cut across it; that there had been no changes in the road where the coffee-nut tree had fallen;

that there was a mud hole at this point, and that a track had been made around it before the tree was cut, so that he could not say that it hindered public travel; that when the tree was felled it crossed this track, but that the butt of the tree was removed some time in the winter, so that the track around the mud hole could be used. It was proven that the appellant cut the coffee tree in the preceding December; that it crossed both the main road and side track, obstructing both for some days, and until a part of the tree was cut off and taken away. The jury might, as they doubtless did, reject the conclusion of the witness, and, from the facts, draw their own inference as to whether the tree across the road hindered the public travel or not. Josephus Brown testified that the road was obstructed, until within a few weeks of the commencement of the suit, by the coffee tree, when a track was then made around it; that he saw the appellant cut the tree. W. Jones testified that the road had been travelled for twenty-five years, and that it had not been changed at the point where the coffee-nut tree lay; that the public had to go around the tree.

All the testimony introduced by the appellee tended to show that the passengers had to go around the obstructions.

We think that the testimony introduced by the appellee, in the absence of any testimony on the part of the appellant, would support the verdict. In such case the verdict will not be disturbed by this court.

The appellant also insists that the court below erred in giving the following instruction, of its own motion, to the jury:

"The continued use of a road for twenty years by the public establishes the road as a highway, and the temporary turning out of the main road to avoid an obstruction or mud hole, and the use of the track around such obstruction—a mud hole—does not vacate or destroy the main road from being a public highway. You are the judges of the evidence and credibility of witnesses. You have the right to believe the witnesses you deem most worthy of credit, and to disbelieve those least worthy of credit."

The appellant complains of that part of the above instruction which tells the jury that "the temporary turning out of the main road to avoid an obstruction, or mud hole, will not operate as a vacation of the part of the highway occupied by the obstruction." We think the charge stated the law, upon the point under consideration, correctly. While the road was occupied by the obstruction it could not be used, not conveniently, at least. The use of the adjoining land temporarily, and until the obstruction could be removed, or the highway repaired, would afford no evidence at all of an intention and purpose on the part of the public to abandon the road. Were the law otherwise, it could readily be shown that most of the highways of the State have been abandoned. In view of the facts in this case, the instruction was proper, and, in this respect, it stated the law fairly.

The judgment below should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

No. 8991.

BROWNLEE *v.* THE BOARD OF COMMISSIONERS OF MADISON COUNTY.

COUNTY ORDERS.—*Promissory Note.*—A county order for taxes refunded containing the words "due and payable June 30th, 1878, with 8 per cent. interest from date," is in legal effect the promissory note of the county, is assignable, and is presumed to be upon a sufficient consideration.

SAME.—*Refunding Taxes Paid on School Lands.—Act of February 8th, 1877.—Pleading.*—In an action against a board of commissioners upon an order for the repayment of taxes paid on school lands, if the taxes were of the class which the act of February 8th, 1877, Acts 1877, p. 139, prohibits from being refunded, and that fact does not appear on the face of the complaint, it must be pleaded as a defence to the action.

From the Madison Circuit Court.

Brownlee v. The Board of Commissioners of Madison County.

J. F. McDowell, H. D. Thompson and *J. A. Kersey*, for appellant.

NIBLACK, J.—Action by James Brownlee, as assignee of Gimason Broyles, against The Board of Commissioners of the County of Madison, upon an order issued by the auditor upon the treasurer of that county. The complaint was in three paragraphs, each counting upon the order in a form somewhat different from the others, and each making a copy of the order, and the endorsement thereon, a part of the paragraph.

The order was as follows: "No. 513. Taxes refunded, $61.65; auditor's office, Anderson, Indiana, June 30th, 1877.

"Treasurer of Madison county, Indiana, pay to Gimason Broyles the sum of $61.65, for taxes refunded on congressional school lands, as allowed by the commissioners' court of said county, at their special June term, 1877. This order is drawn subject to all taxes due from the holder. This order due and payable June 30th, 1878, with 8 per cent. interest from date. Receivable for all county taxes.

"Attest: JOHN L. FORKNER,
"Auditor Madison Co."

Endorsed: "GIMASON BROYLES."

The defendant demurred to the complaint, upon the grounds:

1. That it did not state facts sufficient to constitute a cause of action.

2. That the court had no jurisdiction of the subject-matter of the action.

The demurrer was sustained, and the plaintiff declining to plead further, final judgment was rendered against him upon demurrer.

The only question presented is, was the complaint sufficient upon demurrer? An order, such as that sued upon in this case, is, in legal effect, the promissory note of the county, is assignable, and is presumed to be upon a sufficient consideration. *The Board of Commissioners of Floyd Co.* v. *Day*, 19 Ind. 450.

The defendant has failed to file a brief in the cause; we

have, therefore, no suggestion of any defect in the complaint, either formal or otherwise.

The act of February 8th, 1877, Acts 1877, Reg. Sess., p. 139, absolutely prohibits the commissioners of the several counties from refunding taxes paid on school lands in a large class of cases; but it does not prohibit the refunding of such taxes in every conceivable case. We must, therefore, assume that the taxes ordered to be refunded in this case were paid upon school lands of a class different from those enumerated in that act, upon the principle that both the commissioners and the auditor must be presumed to have done their duty in the premises, until the contrary is made to appear. If the taxes for which the order in suit was given were of the class which the act of February 8th, 1877, *supra*, prohibits from being refunded, that was a matter to be set up as a defence to the complaint.

We see no substantial objection to the sufficiency of the complaint.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

No. 9223.

Smith et al. v. Bissell, Trustee.

Supreme Court.—*Weight of Evidence.*—The Supreme Court will not disturb a finding on the mere weight or preponderance of the evidence.

From the Marion Superior Court.

J. M. Judah and *A. S. Caldwell*, for appellants.

B. Harrison, *C. C. Hines* and *W. H. H. Miller*, for appellee.

Franklin, C.—Bissell commenced this action to obtain judgment for the possession of real estate and damages for

the detention thereof. Issue was formed by a denial; trial by the court; finding for the plaintiff, and, over a motion for a new trial, judgment was rendered in his favor for possession and $100 damages.

The overruling of the motion for a new trial has been assigned as error. The reasons for a new trial were: The finding was not sustained by the evidence, and was contrary to law. The defence relied upon was, that the defendants occupied the premises as tenants of the plaintiff. It was shown by the evidence, and admitted by the defendants, that the plaintiff held the legal title to the premises. Plaintiff's agent testified that there was a talk with defendants about renting; that he asked as plaintiff's agent $40 per month rent, and defendants only offered $25; that "after looking the premises over together, and again discussing the question of rental, I left him stating, that as we differed so materially, we would let the matter rest until Mr. Drew should come up to the city. He has not come yet. Afterwards, I was instructed by Mr. Bissell to get possession, and accordingly notified Mr. Smith that we must have possession." And although Mr. Smith testified that there was an agreement for him to occupy the premises and pay rent, still the evidence on behalf of the appellee tended to support the finding of the court, and in such cases this court will not undertake to weigh the evidence and disturb the finding.

There was no error in overruling the motion for a new trial. The judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the superior court in general term, affirming the judgment in special term, be and the same is in all things affirmed, with costs.

ELLIOTT, C. J., having tried the case, did not participate.

81	190
127	539
81	190
128	240
81	190
132	385
81	190
138	107
81	190
141	600
81	190
164	470

No. 8830.

PULSE ET AL. v. MILLER ET AL.

STATUTE OF FRAUDS.—*Contract for purchase of Real Estate.—Description.—Presumption.*—A contract recited that "The parties of the first part having conveyed certain lands" (not described, except in a certain township and county), "in part, agree to have the same completed within twenty days, or pay to the parties of the second part $500; and the parties of the second part agree to comply *with the contract* on completion of the deeds, or pay to the parties of the first part $500."

Held, in an action thereon, that the agreement was within the statute of frauds, the land not being so described as to be capable of identification, and the presumption being that the *contract* referred to was in parol.

From the Shelby Circuit Court.

E. P. Ferris, *W. W. Spencer* and *A. F. Wray*, for appellants.

T. B. Adams and *L. T. Michener*, for appellees.

ELLIOTT, C. J.—The complaint of the appellants is based upon the following contract: "Articles of agreement made and entered into by and between Hiram Pulse, George Pulse, Reuben Pulse, Peter Pulse and Florence Miller, of the first part, and William Miller and Jasper Heck, of the second part.

"The parties of the first part having this day conveyed certain lands situate in Liberty township, Shelby county, Indiana, in part, agree to have the same completed within twenty days, or pay the parties of the second part the sum of five hundred dollars, and the parties of the second part agree to comply with the contract on completion of the deeds, or pay to the parties of the first part the sum of five hundred dollars." This agreement is properly signed.

It has long been the rule in this State, that a defendant may avail himself of the benefit of the statute of frauds, if it appears upon the face of the complaint that the case is within the statute. We are, therefore, required by the demurrer to the complaint to determine whether the statute constitutes a bar to the recovery sought by the appellants.

A contract for the conveyance of lands must describe the

property upon which it is intended to operate. If there is no description of the land, the statute prohibits the enforcement of the agreement. *Newman* v. *Perrill*, 73 Ind. 153; *Dingman* v. *Kelly*, 7 Ind. 717; *Baldwin* v. *Kerlin*, 46 Ind. 426; *Miller* v. *Campbell*, 52 Ind. 125.

Recourse can not be had to parol evidence to supply a description of the land intended. "Land, for instance, which is purported to be bargained for, must be so described that it may be identified." Browne Stat. Frauds, section 385; *Ridgway* v. *Ingram*, 50 Ind. 145. Another author says: "Nor can parol evidence be received to supply anything which is wanting in the writing, to make it the written agreement on which the parties rely." 3 Pars. Con. 13; *Norris* v. *Blair*, 39 Ind. 90.

A contract can not be partly verbal and partly written. If part rests in parol the entire contract is treated as a verbal one. *Board of Commissioners, etc.*, v. *Shipley*, 77 Ind. 553. If, therefore, part of the essential elements of a contract are evidenced by an oral agreement, the contract is within the statute, and can not be enforced.

It is not necessary that the description should be contained in one of a series of instruments; if, taking all the instruments in the series together, the description appears, it will be sufficient. In order that this should be so, the instrument containing the description must be clearly referred to and identified by the contract signed by the party sought to be charged. *Wills* v. *Ross*, 77 Ind. 1; *Ridgway* v. *Ingram*, *supra*. There is no identification of the deeds referred to in the contract under examination. The connection between the deeds and the contract can only be established by parol evidence, and where this is so the contract is within the statute. In *Wills* v. *Ross*, *supra*, the letter of the party sought to be charged clearly referred to and identified the letter exhibiting the subject-matter of the contract.

It is a settled principle that the written instrument must contain all the essential terms of the contract. The reference in the instrument before us, to the contract which is to be

complied with, is too vague and uncertain to enable us to discover what the terms of the contract were. We can not, from the instrument itself nor from any other, ascertain what contract it is with which the parties are to comply. We can not discover what price was to be paid, when paid, or by whom. The terms of the contract are not stated, and the case is therefore clearly within the statute. Browne Statute of Frauds, section 385; *Remick* v. *Sandford*, 118 Mass. 102; *Williams* v. *Morris*, 95 U. S. 444. In *Barickman* v. *Kuykendall*, 6 Blackf. 21, it was said: "Under this statute, which is copied from that of Charles the 2d, the instrument of writing, whatever may be its form, must either show on its face, or by reference to some other instrument, every material part of a valid contract on the subject—such as the names of the parties, a description of the land, the amount of the purchase-money, etc."

The instrument in suit is given to secure the performance of some agreement concerning lands, and the fair inference from the language used is that the contract to which it refers is a verbal one. It has been held in analogous cases, that, where the contract does not appear to be in writing, the presumption is that it was verbal. *Carlisle* v. *Brennan*, 67 Ind. 12; *Krohn* v. *Bantz*, 68 Ind. 277; *Neal* v. *Neal*, 69 Ind. 419. We can not presume that the contract referred to in the one constituting the foundation of the action is in writing, without violating the principle upon which rest the cases we have cited. It appears, therefore, that the material part of the contract in suit is a verbal one, and, this being so, it is fully within the statute of frauds.

An undelivered deed is not a sufficient writing to take a case out of the statute. A deed is of no validity whatever, until delivered. *Freeland* v. *Charnley*, 80 Ind. 132. A deed can not be deemed a contract until it has been given force, and it is absolutely devoid of force until delivered. A paper of any kind, although it contains all the terms of a con-

tract, is not operative as a contract until it has been delivered with the intention of giving it effect.

We do not find it necessary to consider whether the sum named in the instrument sued on is to be regarded as a penalty or as liquidated damages, for we are clear that the statute of frauds precludes any recovery upon it.

Judgment affirmed.

No. 5821.

NELSON ET AL. *v.* BRONNENBURG.

SHERIFF'S SALE.—*Action to Set Aside.—Pleading.*—A complaint to set aside a sheriff's sale of real estate on execution, against a vendee of the purchaser, on the ground that the execution defendant's personal property was not first exhausted, and that the real estate sold should have been subdivided and a part only sold, is bad on demurrer, if it do not show that the sheriff had knowledge of the personal property or by reasonable diligence could have discovered it, and that it was within reach of the execution, and was so unencumbered that its sale would have yielded something, and that the vendee had notice of the irregularities.

SAME.—*Sale in Parcels.*—Whenever it is doubtful whether real estate levied on is legally susceptible of division, the action of the sheriff, taken in good faith and without abuse of discretion, is conclusive.

SAME.—*Division.*—It is doubtful whether, in selling an undivided share of real estate on execution, a sheriff has power to subdivide such share and sell less than the whole of it.

SAME.—*Sale in Solido.—Limitation of Action to Set Aside.*—A sheriff's sale of real estate *in solido*, which should have been sold in parcels, is not void but voidable, and proceedings to set it aside must be brought within a reasonable time—and *it seems* that this must be done within the year allowed for redemption, unless excuse be shown for the delay.

From the Madison Circuit Court.

R. Lake, W. R. Pierse, H. D. Thompson and *W. March*, for appellants.

J. W. Sansberry, E. B. Goodykoonts and *M. A. Chipman*, for appellee.

BICKNELL, C. C.—The appellee brought this suit to set aside a sheriff's deed, and quiet his title to real estate. The complaint states that, on August 14th, 1871, the plaintiff bought from Jasper H. Nelson an undivided half of a certain lot in the town of Anderson, and on the 19th of October, 1871, bought from the same person the other undivided half of said lot; that the plaintiff's deeds were dated respectively August 14th, 1871, and October 19th, 1871; that on the 16th day of August, 1871, the defendant Chambers obtained a judgment in the Court of Common Pleas of Madison county against said Nelson for $229.90 and costs, and that under an execution issued on that judgment an undivided half of said lot was sold by the sheriff on April 27th, 1872, as the property of said Nelson, to the defendant Chambers, who obtained a deed therefor from the sheriff, on the 28th of April, 1873, and afterwards, in 1873, sold and conveyed said undivided half to his co-defendant Susan Nelson; that said sheriff's sale was void, because said undivided half of said lot was not offered in parcels; that one-fourth thereof would have satisfied said execution; that the lot was divisible without injury into four lots, each 18 by 142 feet, any one of which would have been worth $1,000, and would have been amply sufficient to satisfy said judgment and costs, which amounted to $272 only; that said sale was also void, because said Jasper H. Nelson had personal property subject to said execution, which ought to have been sold and exhausted first. The complaint demanded that both said deeds be set aside, and that the plaintiff be quieted in his title, etc. A demurrer to the complaint for want of sufficient facts was overruled; the general denial was filed and the issues were tried by a jury, who made the following verdict: "We, the jury, find for the plaintiff, and that the sheriff's sale described in the complaint was illegal." A new trial was granted, and the cause was again tried by a jury, who found for the defendants. A second new trial was granted, and the cause was a third time tried by a jury, who returned the following ver-

dict: "We, the jury, find for the plaintiff." They also returned answers to interrogatories. The defendants moved that the jury be required to answer further the interrogatories numbered 2, 3, 4, 5, 9, 12, 13 and 18; this motion was overruled. The defendants' motions for judgment upon the answers to the interrogatories, for a *venire de novo*, for a new trial and in arrest of judgment, were all overruled. Judgment was rendered on the verdict and the defendants appealed.

They assigned errors as follows:

1st. In overruling the demurrer to the complaint.

2d. In overruling the defendants' motion for judgment upon the answers to the interrogatories.

3d. In overruling the defendants' motion for a *venire de novo*.

4th. In overruling the motion for a new trial.

5th. In overruling the motion in arrest of judgment.

The complaint claims that the deeds shall be set aside and the plaintiff's title quieted for three reasons:

1st. That the undivided half of the lot was not sold in parcels.

2d. That the undivided half of the lot was sold for an inadequate price.

3d. That the undivided half of the lot was sold before the defendants' personal property was exhausted.

In Indiana, the duties of a sheriff upon a sale on execution are, in general, regulated by statute. "In all cases where the personal estate of the debtor, subject to execution, is insufficient to satisfy the execution, the real estate shall be exempt from levy and sale until the personal estate is levied upon and sold," etc. 1 R. S. 1876, p. 210, section 444. It has been held under this section, that where an execution defendant, pending a levy upon his real estate, and before the sale, offered personal property to the sheriff, which offer the sheriff disregarded, a subsequent sale of the real estate should be set aside, in a direct proceeding for that purpose. *Davis* v. *Campbell*, 12 Ind. 192. It is also held that the sheriff need not first levy upon personal property, if it be so encumbered

that it would produce nothing upon the execution. *Detrick* v. *The State Bank*, 6 Ind. 439. And under another statute, which requires the sheriff to levy first upon the property designated by the execution defendant, it is held that the sheriff is not bound to seek the execution defendant and demand from him such designation. *Drake* v. *Murphy*, 42 Ind. 82.

The complaint under consideration simply alleges that Jasper H. Nelson had personal property subject to execution, which ought to have been, but was not, exhausted before any sale of his real estate. It is not alleged that the sheriff had knowledge of such personal property, or by reasonable diligence could have discovered it. There is no description of the property, and no statement of its locality. It is not averred that it was in the county. It is not averred that it might have been taken under the execution held by the sheriff, nor that it was unencumbered, so that a sale of it would have produced something upon the execution. Some of these defects are fatal. There is no cause of action in such a case, without an averment that the sheriff had knowledge of the personal property, or by reasonable diligence might have discovered it, and that the same might have been taken under the execution if he had discovered it. The complaint contains no cause of action so far as relates to the alleged failure to levy upon personal property. Inadequacy of price alone is not sufficient to avoid a sheriff's sale. *Roe* v. *Ross*, 2 Ind. 99; *Benton* v. *Shreeve*, 4 Ind. 66; *Soule* v. *Champion*, 16 Ind. 165. But inadequacy of price, in connection with other irregularities, may be sufficient to avoid a sheriff's sale. *Dawson* v. *Jackson*, 62 Ind. 171. As where property is unnecessarily sold as a whole instead of in parcels. *Reed* v. *Carter*, 3 Blackf. 376 (26 Am. Dec. 422); *Doe* v. *Smith*, 4 Blackf. 228; *Reed* v. *Diven*, 7 Ind. 189. The statute in reference to sales of real estate on execution, in parcels, is as follows: "If the estate shall consist of several lots, tracts, and parcels, each shall be offered separately; and no more of any real estate shall be offered for sale than shall be necessary to satisfy the

execution, unless the same is not susceptible of division." 1 R. S. 1876, p. 217, section 466. In the case at bar there were no separate parcels of the land. The property was an undivided half of a town lot; if there was any irregularity in the sale, it was a violation of the last clause of said section 466, to wit, the sale of more than was necessary to satisfy the execution, when the interest levied on, namely, the undivided half of the lot, was susceptible of division.

It is questionable whether section 466, *supra*, embraces any lands not susceptible of division territorially; but, waiving that question for the present, what is the general duty of the sheriff under section 466? In *Reed* v. *Diven*, *supra*, the court held that a similar provision in the statutes of 1852 imposed a duty on the sheriff which he could not omit. They said: "The property levied on, being divisible, he is restricted from offering more of it than may be necessary to discharge the debt in his hands for collection." And they held, that, under the statute, the sheriff himself, when he levies on real estate, must be presumed to know whether it is susceptible of division or not. In *The State* v. *Leach*, 10 Ind. 308, under our present statute, *Reed* v. *Diven*, *supra*, was cited with approbation. In *Voss* v. *Johnson*, 41 Ind. 19, the court, after citing section 466, *supra*, said: "We are of opinion that policy requires that sheriffs and execution plaintiffs shall be held to a reasonably strict compliance with these statutes."

The allegation in the complaint is, that the sheriff sold to the execution plaintiff the entire undivided half of said lot, when the lot was susceptible of division into four equal parts, and when the undivided fourth of it was sufficient to satisfy the execution, being worth $1,000, while the amount due on the execution was only $272, and that, therefore, not only the sheriff's deed to the execution plaintiff, but the deed of the latter to his co-defendant, Susan Nelson, were both void.

If section 466, *supra*, embraces such a case as the present, the question arises, can the plaintiff, under the circumstances stated in the complaint, take advantage of the non-compli-

ance with the statute. If a sale in violation of the statute were absolutely void, and a mere nullity, the right to set it aside could not be barred by delay in proceeding within the time fixed by the statute of limitations, but if the sale be voidable only, it is capable of affirmation and is valid until avoided, and on general principles the application to set such a sale aside would not be sustained unless made within a reasonable time.

It was formerly held in Indiana, that such a sale by the sheriff was absolutely void, a mere nullity; and in the case of *Catlett* v. *Gilbert*, 23 Ind. 614, the preceding cases of *West* v. *Cooper*, 19 Ind. 1, and *Patton* v. *Stewart*, 19 Ind. 233, were overruled, because they held such sales voidable only, and because they changed the rule laid down in *Banks* v. *Bales*, 16 Ind. 423, and other earlier cases, which declared that such sales were absolutely void. But the ruling in *Catlett* v. *Gilbert*, *supra*, has not been adhered to. In *Bardeus* v. *Huber*, 45 Ind. 235, the court said: "We do not mean to decide that if a sheriff shall sell the whole of a single tract or parcel of land, when it is susceptible of division without injury, and when a sale of part of it would satisfy the execution, the sale is necessarily void." And in *Weaver* v. *Guyer*, 59 Ind. 195, the court said: "sometimes the word 'void' is used in the books where 'voidable' would convey the meaning more accurately. So in the case of *Banks* v. *Bales*, *supra*, where more land had been sold than was necessary to satisfy an execution, and it appeared that it was susceptible of division, the sheriff's deed was pronounced 'a nullity.' We are of opinion, that that is a mistake; that a sheriff's deed in such case is not a nullity, nor is such sale void; such sale is doubtless voidable; but, unless avoided by a party entitled to avoid it, it will be valid." So in *Stotsenburg* v. *Same*, 75 Ind. 538, the court said: "A sale of real estate, as an entirety, which is susceptible of division and sale in parcels sufficient to satisfy the execution, is voidable, and may be set aside." See also *Jones* v. *Kokomo, etc., Association*, 77 Ind. 340.

It may therefore be considered as settled in Indiana, that such sales are voidable, but not void, and that is the general rule throughout the United States. See the cases cited in Freeman Ex., section 296. It follows that such a sale can not be set aside against an innocent vendee of the original purchaser, unless such vendee had notice of the irregularity in the sale. *The McLean Co. Bank* v. *Flagg*, 31 Ill. 290; *Mixer* v. *Sibley*, 53 Ill. 61.

In the present case, the property was bought at the execution sale by the judgment plaintiff, who, after the expiration of the year for redemption, conveyed it to his co-defendant, Susan Nelson. The complaint does not charge that she had any notice of the alleged irregularity in the sale. It was held, in the case of *Piel* v. *Brayer*, 30 Ind. 332, that the vendee of a judgment plaintiff, who purchased at a sheriff's sale, is chargeable with notice of the contents of the record, and that where the record showed a levy upon separate parcels of land, and a sale of them in mass, such vendee had constructive notice of that irregularity; but, in the present case, the record merely shows a levy and sale of the undivided half of a town lot, without anything to indicate susceptibility of division, or irregularity of any sort in the sale. In *Hasselman* v. *Lowe*, 70 Ind. 414, the court below had instructed the jury that "The judgment plaintiffs are chargeable with notice of all irregularities in a sheriff's sale, and the grantees of the judgment plaintiffs can take no greater title or right in the property sold at sheriff's sale than was acquired by the judgment plaintiffs by virtue of said sale." This court held that the foregoing instruction was wrong, and that if such a purchaser at the sheriff's sale, after obtaining his deed from the sheriff, should convey the land for a valuable consideration, without notice, his grantees might become innocent purchasers, and thus take a better title than he had. The complaint, therefore, stated no cause of action against the defendant, Susan Nelson.

Upon the claim alleged against the defendant Chambers, who was the execution plaintiff and also the purchaser at the exe-

cution sale, it may be observed that, in some cases, a sale of the entire property is indispensable; as, for example, where a single lot is subject to a mortgage covering the whole of it, and the equity of redemption is levied upon and is to be sold on execution, subject to the mortgage. The equity of redemption can not be divided and sold in parcels. *Tifft* v. *Barton*, 4 Denio, 171.

And whenever it is doubtful whether the interest levied on is legally susceptible of division, the action of the officer upon such a question, where no fraud, no bad faith, and no abuse of discretion are shown, is conclusive. Thus, in the case of *Wright* v. *Yetts*, 30 Ind. 185, the court said: "Where, as in the case of *Catlett* v. *Gilbert*, 23 Ind. 614, the property sold as an entirety was occupied as two separate parcels, and this fact was known to the sheriff and the purchaser, there can be no serious doubt that the sale can not be sustained, for the express letter of the statute has been disregarded. But where there is no actual division of the property, and the point must be determined by the sheriff, whether or not the same is susceptible of division, a more difficult question is presented, and one requiring the exercise of official discretion. Upon the conclusion reached, the sheriff must base his official action, and unless that action operates as a fraud upon the execution defendant or his creditors, it can not be reviewed by the court. The statute commits to the judgment of the officer the solution of the inquiry whether the property can be divided or not, and upon a reasonable exercise of this judgment the purchaser has a right to rely. Wherever there may be an honest difference of opinion, the conclusion reached by the officer must be final." So in the case of *Bardeus* v. *Huber*, 45 Ind. 235, OSBORN, J., delivering the opinion of the court, said: "We think the provision that 'no more of any real estate shall be offered for sale, than shall be necessary to satisfy the execution, unless the same is not susceptible of division,' requires the sheriff to exercise a sound discretion in offering real estate for sale on execution, where there has been no actual division made, and it is at the

time in one tract or parcel. It is not enough that there may be an honest difference of opinion as to the propriety of a division. But it must be so palpable and clear that the sale should have been in parcels, that a sale without division would operate as a fraud upon the execution defendant, and show that the sale of the whole tract was an abuse of official discretion." And in Freeman on Executions, section 295, we find the following: "But it must be remembered that, with respect to subdividing a large tract into parcels, the officer must exercise his discretion; and when he has honestly done so, his judgment must generally be regarded as conclusive." If such be the law as applicable to any tract of land capable of territorial subdivision, with still stronger reason is it applicable to the case at bar, where the property levied on was an undivided half of a town lot; such an interest is not capable of any territorial subdivision by the sheriff; he had no right to select the one-fourth, or the one-eighth, or any other part of the ground and sell it as part of the undivided interest on which he had levied. He could not tell where, upon partition, the undivided half levied upon would be. If it be suggested that he might have sold the undivided half of the undivided half, or the undivided fourth of the undivided half, or the undivided third of the undivided half, the answer is, that he was called upon to exercise an official discretion under the statute. It is doubtful whether section 466, *supra*, embraces or authorizes any other division than a territorial division; it is doubtful whether the sheriff had any right to subdivide the interest levied on when he could not subdivide the land itself, or locate any part of it, and under such circumstances, the present complaint, which does not show any fraud, or bad faith, or abuse of discretion in the sheriff, but merely avers that the sale was "void because said sheriff did not offer said real estate in parcels," when the lot might have been divided into four lots, eighteen feet front and rear by one hundred and forty-two feet deep, any one of which would have paid the execution and costs, is clearly insufficient; the sheriff had

no right to divide the property into lots at all; he had an undivided interest to sell, and the quantity and location of the land covered by that undivided interest could be ascertained only upon a partition of the lot. But, further, the sheriff's sale in mass instead of in parcels being voidable and not void, the right to have the sale set aside therefor may be waived by parol, *Vilas* v. *Reynolds*, 6 Wis. 214; and may be barred by delay. *Roberts* v. *Fleming*, 53 Ill. 196. Some objection to the sale must be made in a reasonable time, or else some good reason must be shown why such objection was not made in a reasonable time. Where the property sold is subject to redemption within a given time, it has been held that the application to set the sale aside must be made before the expiration of that time, unless some excuse be shown for the delay. In *Raymond* v. *Pauli*, 21 Wis. 538, the court held, that an execution sale of land, in disregard of the law, which requires it to be offered in parcels, is not void, but only voidable at the instance of the party aggrieved. The remedy is, to apply within a reasonable time, and have the sale set aside on that ground. Undoubtedly, a reasonable time must be some time within the period fixed by law for a redemption. If that period be allowed to expire and a deed be executed, the application can not afterwards be made, unless under special circumstances of fraud or mistake, showing some reasonable excuse for the delay. In *Raymond* v. *Holborn*, 23 Wis. 57, the same doctrine is asserted, and the court say that, by making no effort to redeem while the right to redeem existed, the party must be presumed to have acquiesced in the sale.

The present complaint does not show that the plaintiff made any objection to the execution sale, and it shows no reason why such objection was not made, and it does show that the year for redemption expired on the 28th of April, 1873, and that the plaintiff did not commence this suit until afterwards; he waited until the purchaser at the execution sale had obtained his deed and had made a deed to his co-defendant, and the complaint alleges no excuse whatever for the delay. The

rule, requiring the objections to such a sale to be made in a reasonable time, has been adopted generally in those States which hold such a sale to be voidable and not void. *San Francisco* v. *Pixley*, 21 Cal. 56; *Cunningham* v. *Cassidy*, 17 N. Y. 276; and see the cases cited in Freeman on Executions, section 296.

We think the complaint contained no cause of action against either of the defendants, and that the court erred in overruling the demurrer thereto; and for this error the judgment of the court below ought to be reversed.

Per Curiam.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is hereby in all things reversed, at the costs of the appellee, and this cause is remanded, with instructions to the court below to sustain the demurrer to the complaint.

No. 9200.

Highfill *v.* Monk.

New Trial.—*Record.*—A ruling assigned as cause for a new trial, to be available in the Supreme Court, must appear by the record to have been made, the statement of it in the motion not being sufficient.

Evidence.—*County Order.*—*Set-Off.*—*Answer.*—A county order is admissible in evidence in support of a set-off for it, where the answer of set-off so identifies it by date and number, and amount of principal and interest, that the opposite party can not be misled.

Supreme Court.—*Weight of Evidence.*—If there be any evidence tending to support the finding below, the Supreme Court will not disturb it, however overwhelming the testimony to the contrary may be.

From the Crawford Circuit Court.

N. R. Peckinpaugh and *W. T. Zenor*, for appellant.

E. M. Tracewell, B. P. Douglass, S. M. Stockslager and *S. D. Luckett*, for appellee.

MORRIS, C.—This suit was brought by the appellant against the appellee. The complaint contains five paragraphs. The first is upon a promissory note for fifty dollars, executed by the appellee to the appellant. The second is for money had and received by the appellee for the use of the appellant. The third paragraph is upon a contract alleged to have been made between the parties; that the appellant, being treasurer of Crawford county, for the years 1876, 1877, 1878 and 1879, under an agreement and understanding with the appellee, accepted and received checks from him, drawn on himself, in favor of divers parties, in payment of the county tax of the parties in whose favor such checks were drawn, and charged himself with the amount of county tax so paid on the books of his said office, and accounted therefor to the proper authorities; that, in consideration thereof, the appellee agreed to pay him the amount of such checks in county orders, at their par value. A bill of particulars of the orders and checks so drawn by the appellee, and received by the appellant, is filed with this paragraph; that there is due the appellant, on account of the checks so received by him, $475, for which he demands judgment. The fourth paragraph is for money paid by appellant to and for the use of the appellee. The fifth paragraph is for $62.59, paid by the appellant for the appellee in paying his taxes for the years 1877 and 1878.

The appellee answered the complaint in five paragraphs. The first was the general denial; the third alleged payment; the second and fourth paragraphs were substantially the same. It is stated in these paragraphs, that the appellant was treasurer of Crawford county during the years 1876, 1877, 1878 and 1879, and that, during those years, there was an understanding and agreement between the appellant as such treasurer and the appellee, that the latter, then owning a large amount of county orders on Crawford county, should deposit the same with the appellant as such treasurer, and draw orders on him from time to time in payment of taxes due said county, in payment of such deposits; that he placed in the hands of

the appellant, as such treasurer, protested orders on Crawford county, bearing interest at the rate of six per cent. per annum, of different dates and amounts, amounting in all, principal and interest, to $3,000, a bill of particulars of which is filed with said paragraph; that the appellant, as such treasurer, as the said orders were deposited with him, converted said orders to his own use, by taking credit therefor at their face as redeemed orders, in his settlement as such treasurer with said county. The appellee offers to set off said orders, or so much thereof as may be necessary, against any amount which the appellant might prove against him, and demands judgment for the balance.

The fifth paragraph of the answer was to the fifth paragraph of the complaint.

The appellant replied to the answer by a general denial and several special paragraphs, which need not be particularly noticed. The cause was submitted to the court for trial. The court found for the appellee in the sum of $97.08.

The appellant filed a motion for a new trial, for the following reasons:

1. Because the court erred in permitting the appellee to amend, on the trial of the cause, the second paragraph of his answer, and his bill of particulars.

2. Because the court erred in admitting in evidence, over the objection of the appellant, a certain county order, dated —— day of ———, 187–, No. 332, for the sum of $237.35, purporting to be issued by Crawford county to Malachi Monk.

3. That the court erred in admitting in evidence, over the objection of the plaintiff, a certain county order, purporting to be issued by Crawford county, dated the —— day of ——, 187–, to one Malachi Monk, for the sum of $300, No. —.

4. That the finding of the court is not sustained by sufficient evidence.

5. That the finding of the court is contrary to law.

6. That the finding of the court is contrary to evidence.

The motion for a new trial was overruled, and final judg-

ment rendered for the appellee. The evidence is properly in the record. The overruling of the motion for a new trial is assigned as error.

The appellant insists that the court erred in permitting the appellee to amend, on the trial, the second paragraph of his answer. There is nothing said in the record as to such an amendment, except in the motion for a new trial. If such an amendment was made, the record fails to show that the appellant objected, or that he took any exception to it. No question as to any amendment made to the pleadings is presented by the record to this court for decision.

The court below permitted the appellee to put in evidence, in support of his answer, two orders issued by Crawford county and payable to Malachi Monk, the appellee. One, No. 332, dated April 2, 1877, calling for $237.35, on which there had accrued $8.19 interest, making in all $245.54; the other, No. 490, and calling for $300, on which there had accrued $50 interest. The principal dispute between the parties is in relation to these orders.

The objections taken to the introduction of the orders as evidence are, that they were irrelevant, immaterial and incompetent, and not sufficiently described in the bill of particulars. The orders are described in the bill of particulars by their dates, numbers and the amount, not of their face, but by stating the amount of principal and interest—the first as calling for $245.54, and the other for $350. We think the description of the orders in the bill of particulars was sufficiently certain to apprise the appellant of what was intended. The date and numbers of the orders being given, the appellant could not have been misled.

It would seem to be quite clear that the orders were both relevant and material evidence. The appellee claimed in his answer that he had, pursuant to an agreement between him and the appellant, deposited a large number of orders, including the orders under consideration, drawn by the county of Crawford and payable to himself, with the appellant, to be

used by the latter as redeemed orders in settlement with the county, and for which the appellant was to account to him. That the orders so deposited would be competent and material evidence, is too clear to be questioned. They would be the best evidence of the amount and to whom payable, and their dates, numbers, amounts, and to whom payable, would identify them as the orders referred to in the pleadings. The appellee testified that he had deposited these orders with the appellant, and proved by the auditor of the county that the appellant had used them in his settlement with the county as treasurer, and received credit for them in such settlement, as orders redeemed by him. We think the court did not err in permitting these orders to be read in evidence.

The fourth, fifth and sixth reasons for a new trial may be considered together.

Counsel for the appellant say: "If the appellee is wrong and did not make a deposit of these two orders with the appellant, then the appellant is entitled to a judgment for from $450 to $500; but if it be true that the appellee, as the court evidently must have found, had made a deposit of these two disputed orders, and had received no credit therefor, then, perhaps, the judgment of the court may not be much out of the way."

If there was any testimony legally tending to show that the appellee had deposited the orders in question with the appellant, and that he had not been paid for them, then, however strong and overwhelming the testimony to the contrary may have been, the finding of the court below can not be disturbed. This court will not weigh the conflicting testimony in a case. *The Fort Wayne, etc., R. R. Co.* v. *Husselman*, 65 Ind. 73. This case has been approved by a great number of cases since decided.

There is certainly some testimony tending to prove that these disputed orders were deposited with the appellant by the appellee, and that the latter had not received credit for the same. The appellant says in his brief: "The appellee

testifies that he deposited these two orders, and the appellant that he did not." The appellant's counsel contend that the appellant testified truly and the appellee falsely or mistakenly. But we can not decide this dispute without weighing the evidence. Not only does the appellee testify to the deposit of the orders, but the auditor of the county also testifies that the appellant had used them as treasurer of the county in making settlement with it, and received credit for them in such settlement. The counsel for the appellant say that the appellee testified that he had never received credit for the $350 order, and then undertake to demonstrate, by the testimony and books of the appellant, that he had received such credit. The appellee does swear that he had not received credit for the order for $245.54, nor for an order for $348.75, deposited by him with the appellant. If he had not received anything for these three orders, the finding in his favor is too small. But if the appellee, in speaking of the $350 order, meant the order for $348.75, the finding is about right. We can not say that the court below erred in weighing the testimony of the appellee—it was for the judge who tried the cause, saw and heard the witnesses, to determine which of them was most worthy of credit. We can not, therefore, say that he erred in overruling the motion for a new trial.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

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No. 8940.

WOOLEN v. ROCKAFELLER, EXECUTOR.

SHERIFF'S SALE.—*Judgment.—Evidence.*—A judgment or decree of a competent court, valid upon its face, is *prima facie* sufficient to support a judicial sale made upon it. *Glidewell* v. *Spaugh*, 26 Ind. 319, overruled.

Woolen v. Rockafeller, Executor.

SAME.—*Title.—Real Estate, Action to Recover.*—A judgment of a court of superior jurisdiction (without the complaint and pleadings), execution and return of sale of land, and sheriff's deed in accordance with such return, are sufficient to show title in the purchaser against a party claiming title derived from the judgment defendant.

SAME.—*Sheriff's Return of Sale.—Notice.—Presumption.*—A sheriff's return of sale of real estate on execution showed the proper posting of notices of the sale in M. township, without stating that the land was in that township.

Held, the contrary not appearing, that it would be presumed that the sheriff discharged his duty as to the notice.

EVIDENCE.—*Tax Title.—Auditor's Deed.*—An auditor's deed upon a tax sale, put in evidence by the defendant (who sought to show title in himself), failed to recite that the owner of the land was without personal property out of which the taxes could have been collected. Without other proof, or any assurance of an intention to make such proof, it is not error to reject such a deed, offered in evidence, to the defendant from the purchaser for taxes.

From the Madison Circuit Court.

E. P. Schlater and *A. B. Young*, for appellant.

M. S. Robinson and *J. W. Lovett*, for appellee.

NIBLACK, J.—Action by Ephraim K. Rockafeller, describing himself as the executor of the last will of Eli Ferguson, deceased, against James H. Woolen, to recover the possession of, and to quiet his title to, a sixteen-acre tract of land. The complaint was in two paragraphs. The first was in the common form for the recovery of the possession of real estate. The second averred that the plaintiff had become the owner of the land in controversy by purchase at a sheriff's sale upon a decree of foreclosure of a mortgage upon it, but that the defendant claimed title to said land under a deed executed to him by one Frank M. Milliken, who had no interest or estate in the same; such deed casting a cloud, and only a cloud, upon the plaintiff's title. The defendant answered in general denial. The cause was tried by the court, and the court made a finding that the material allegations contained in the complaint were true; that the plaintiff was the owner of the land

in suit and entitled to the possession of the same; that the defendant was in possession of said land without right, and unlawfully detained the possession thereof.

The defendant moved for a new trial, alleging, amongst other things, as causes, that the finding was not sustained by the evidence, and that the court erred in refusing to permit the deed from Milliken to him, referred to in the second paragraph of the complaint, to be read in evidence, but the court refused to grant a new trial, and rendered judgment for the recovery of the land, and quieting the plaintiff's title as against the defendant.

The only question made here is upon the refusal of the court to grant a new trial.

The plaintiff read in evidence a decree of foreclosure in the Madison Circuit Court, in a suit in which he, as the executor of Eli Ferguson, deceased, was plaintiff, and Joseph S. Hollowell and others were defendants, for the sum of $1,604.33 against the land, described in the complaint, upon a mortgage purporting to have been executed by the said Hollowell to Ferguson on the 29th day of December, 1866; also an order of sale issued upon said decree of foreclosure; also the return of the sheriff showing that he, the plaintiff, had become the purchaser of the land under said order of sale; also a sheriff's deed to him for the land, purporting to have been executed in pursuance of the sheriff's return, after the time for redemption had expired, and describing the plaintiff as the executor of Ferguson.

Counsel for the defendant then stated to the court that their client claimed title to the land in dispute, under a tax deed executed by the auditor of Madison county to Frank M. Milliken, named in the complaint, and as the immediate grantee of the said Milliken, and, over the plaintiff's objection, read such tax deed in evidence. The deed recited that certain taxes had been assessed against Hollowell on a portion of the land sued for, and other adjacent lands, for the years 1875, 1876, and 1877, which had been returned delinquent for non-payment,

and that the lands so chargeable with delinquent taxes, had been sold to pay such taxes, said Milliken becoming the purchaser thereof, but it contained no recital that Hollowell had no personal property which might have been levied upon and sold for the payment of the taxes, or some part of them, for which the lands were sold.

The defendant, also, offered in evidence a deed from Milliken to him, which evidently embraced a considerable part of the land mentioned in the complaint, and a small part of one of the tracts described in the tax deed, but the plaintiff objected to the introduction of the deed thus offered, upon the grounds that it did not describe the land correctly, and that it was irrelevant, incompetent and immaterial, when considered in connection with the matters then in issue before the court, and the court, without assigning any specific reason for its action, refused to permit the proposed deed to be read in evidence.

It is insisted that the reading in evidence of the decree of foreclosure against Hollowell and others, without the production of the complaint, and other papers, showing that the court had jurisdiction to render such a decree, did not establish the existence of such a decree as was necessary to support the sheriff's sale and the deed, also read in evidence, and that, consequently, the finding of the court was not sustained by sufficient evidence. The position thus assumed is not in harmony with the general tenor of the decided cases in this State. It is, on the contrary, well settled with us that the production of a judgment or decree of a competent court, valid upon its face, is, *prima facie*, sufficient to support a judicial sale made upon it. *Splahn* v. *Gillespie*, 48 Ind. 397; *Shipley* v. *Shook*, 72 Ind. 511; *Rucker* v. *Steelman*, 73 Ind. 396; *Turner* v. *The First National Bank, etc.*, 78 Ind. 19. The case of *Glidewell* v. *Spaugh*, 26 Ind. 319, is cited as maintaining a different doctrine.

The facts, upon which the admission of the judgment referred to in that case rested, are very imperfectly stated in the opinion, and hence we have no means of ascertaining whether

that case was in any respect a parallel case with this; but whatever the facts in that case may have been, it has been long since impliedly overruled in respect to the doctrine it is now cited to maintain.

It is further insisted that, as the plaintiff did not prove title in Hollowell at the time he executed the mortgage upon which the decree of foreclosure was based, the evidence failed to make out a case for the plaintiff.

It is true, that in actions like this against a person other that the judgment defendant, the general rule is, that, in addition to proof of the judgment, execution, sale and sheriff's deed, the plaintiff must show title in the judgment defendant; but, where both parties claim under the judgment defendant, title in him is admitted, and need not be otherwise proven. The evidence was not conclusive on that point, but the fair inference from all the evidence was, that both parties claimed title under Hollowell, the judgment defendant.

The sheriff, in his return to the order of sale, read in evidence, stated, amongst other things, that he posted up notices of the sale in three of the most public places in Monroe township, of Madison county, but did not say that Monroe township was the township in which the real estate was situate.

It is contended, that, by reason of that omission, the return was fatally defective, and hence did not show a valid sale.

The law does not, however, favor the application of so strict a rule to returns made upon sheriffs' sales.

It is the policy of the law to uphold execution and judicial sales so far as can reasonably be done, and where a sheriff's return is silent as to any particular act he is required to perform in making a sale, the presumption is that the sheriff did his duty. Rorer on Judicial Sales, sections 14, 57 and 776; *White* v. *Cronkhite*, 35 Ind. 483; *Talbott* v. *Hale*, 72 Ind. 1.

It is further contended that the court erred in excluding the deed from Milliken to the defendant, if, for no other reason, because the averment of the second paragraph of the complaint necessarily brought that deed before the court.

The averment of the second paragraph of the complaint, thus relied on, was, in effect, that the defendant had no valid claim of title under the Milliken deed, and we are unable to see that the admissibility of that deed, when offered in evidence as proof of title, was in any manner promoted by such an averment.

As has been seen, the tax deed did not recite that Hollowell had no personal property from which the unpaid taxes assessed against him might have been collected. There was no proof, nor offer to prove, *aliunde*, that Hollowell had no such personal property. At the time, therefore, the Milliken deed was offered in evidence, the defendant had not shown, and had given no assurance of his intention or ability to show, a valid title in Milliken to any of the land included in the tax deed, or described in the complaint. *Smith* v. *Kyler*, 74 Ind. 575. No injury was consequently inflicted upon the defendant by the exclusion of the Milliken deed.

Whether that deed might not have been made legally admissible as evidence of title in the defendant to some of the land named in the complaint by proper preliminary assurances as to additional facts expected to be proven, is a question we need not now consider, as no such question is presented by the record.

It is still further contended that the Milliken deed ought to have been admitted, to show that the defendant had become the assignee of, or subrogated to, the State's lien for taxes on some of the land claimed by the plaintiff, and hence entitled to a foreclosure of such lien on the land.

But no such question was presented to the court below, and nothing was reserved upon the proceedings below which presents such a question for our decision here. The tax deed and the Milliken deed were both offered in evidence to prove title in the defendant, and not to establish a right in him to a decree to enforce a tax lien on the land. *Flinn* v. *Parsons*, 60 Ind. 573; *Duke* v. *Brown*, 65 Ind. 25.

The judgment is affirmed, with costs.

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No. 8993.

NIPP ET AL. v. DISKEY.

PROMISSORY NOTE.—*Contract.—Payment of Note in Services.—Demand.*—When a note for the payment of money on a day fixed contains a stipulation that payment may be made before maturity in sawing lumber at a named price, the payee to furnish the logs therefor, the payor may give notice of his readiness to perform accordingly, and request that the logs be produced, and a failure of the payee to do so will excuse performance on the part of the payor; and the payee can not demand money without showing that he furnished logs and requested the payor to saw them.

SAME.—A stipulation in a note that it may be paid in specific articles of property or in work or labor is for the benefit of the payor, and he may, as he elects, pay either in property or labor, and if he make proper tender can compel the creditor to accept payment in the articles or work; but if he fails to duly exercise his election, or make a proper tender when it is necessary, the creditor may enforce payment in money.

From the Grant Circuit Court.

F. J. Hall, T. J. Newkirk, W. A. Bonham and *W. H. Carroll*, for appellants.

A. Steele and *R. T. St. John*, for appellee.

ELLIOTT, C. J.—Appellants were the plaintiffs below, and brought this action upon two promissory notes and a chattel mortgage executed by the appellee.

A verdict was returned for the appellee, and separate motions for a new trial were filed by the appellants. The only argument made in support of the appellant Bell's claim for a reversal is, that the verdict is contrary to the evidence. We find some evidence supporting the conclusion of the jury, and that requires us to decline to disturb it.

In arguing the questions presented upon the ruling denying Nipp's motion for a new trial, counsel discuss the evidence, but what we have said in reference to Bell's motion disposes of this point.

The appellant Nipp presents questions not presented by Bell, and we now proceed to consider them. The note owned by Nipp, and acquired by assignment from Bell, is in the usual form, but contains this additional provision: "The amount of this may be discharged at any time before its ma-

turity, in sawing lumber at fifty cents per one hundred feet, the said payee to furnish logs out of which to saw said lumber." The appellant Nipp asked the following instruction: "The note sued on in this case, calling for $1,211.23, owned by the plaintiff Nipp, contains a provision that the same may be discharged at any time before maturity, in sawing lumber at fifty cents per 100 feet, the payee to furnish logs out of which to saw said lumber. If it is shown that the payor, before the maturity of the note, kept himself ready to do said sawing, and even demanded logs for that purpose, and the plaintiff failed to furnish them, it would not be a discharge of the note, as the furnishing of the logs and the sawing of the lumber were mutual and concurrent acts, and according to the terms of the contract might have been so discharged, but if there was a failure of either party the note at once became payable in money."

In criticising this instruction appellee's counsel say that it is erroneous because it assumes the existence of a fact. We do not think there is any force in this objection. It is proper for the court to construe written instruments, and to inform the jury of their legal meaning and effect. It is also proper for the court to state what stipulations are contained in a written contract, in cases where there is no controversy as to its execution, and no dispute as to what its language is.

We think the instruction was properly refused, for the reason that it declares that the note became payable in money, although the entire default was on the part of the appellant. The appellee was liable to pay in money only in the event that he failed or refused to saw logs into lumber when furnished to him for that purpose by the appellant. The former was not liable to an action for money until he had been put in default. The appellant could not, at his election, deprive the appellee of the benefit of the stipulation in the note. It would have been error to give the instruction as asked, and the court did right in refusing it.

The court, at the request of the appellee, gave the following

instruction: "If you find from the evidence that the defendant Diskey, before the note to Nipp became due, informed and notified Nipp that he was ready and willing to pay said note in sawing lumber, and that he, Diskey, wanted Nipp to bring on the logs, and if said notice was a sufficient time before the note fell due to have done such sawing by the time the note fell due, then the plaintiff Nipp can not recover on the note due him."

It is maintained by appellant's counsel that the stipulation in the note providing for payment in sawing lumber was for his benefit alone, and that he might waive or enforce it at pleasure. This position is not tenable. A stipulation providing that a note may be paid in specific articles of property, or in work and labor, is for the benefit of the payor. He may, if he elects, pay the note in property or labor, and, if he makes the proper tender, can compel the creditor to accept payment in the articles or work designated in the note.

If a debtor, having the right to elect to pay a note in services or property, fails to duly exercise his election, and make the proper tender in cases where a tender is necessary, then the creditor may enforce payment in money. The creditor, however, can not elect to disregard the stipulation as to the mode of payment, and demand money in the first instance. His right to payment in money does not arise until the default of the debtor to perform, or offer to perform, the stipulation in the note as to the mode of payment.

Under the stipulation in the note, the appellee had a right to elect to pay the note by sawing lumber, at the price fixed by the contract. As the appellant was bound to furnish the logs out of which the lumber was to be sawed, no more could be done by the appellee than to keep himself prepared to perform the stipulation, and notify the former of his readiness to do the work, and request him to furnish the logs. The contract gave appellee a right to pay in the mode stipulated, and if he did all that the appellant would permit him to do, he can not be deemed to have been in default. *Mason* v. *Toner*, 6 Ind. 328; *Parks* v. *Marshall*, 10 Ind. 20; *Duerson* v. *Bel-*

lows, 1 Blackf. 217. The option as to whether the note should be paid in money or in work, was with the appellee until the maturity of the note. *Ireland* v. *Montgomery*, 34 Ind. 174. If he exercised this option by making tender of performance, and doing all that it was in his power to do, he can not be deemed to have lost his right.

Where a debtor has a right to pay by doing work upon materials to be furnished by the creditor, the latter can not destroy that right by refusing to furnish the materials provided for by the contract. If the rule were otherwise, the result would be the punishment of one who was entirely free from fault, because of his adversary's default. The law is not subject to the reproach of sanctioning any such a doctrine.

Judgment affirmed.

No. 8734.

SMITH v. KING.

PRACTICE.—*Judgment Reopened.—Section 601, R. S. 1881.—Complaint.—Demurrer.*—A party notified by publication only, and who has had a judgment against him opened under sec. 601, R. S. 1881, may demur to the original complaint for such cause as would not be deemed amendable on appeal, or cured by the verdict on motion in arrest.

PARTITION.— *Cross Petition.*— *Notice.*— *Res Adjudicata.*—If a person, not named in the petition for partition, becomes a party, and files a cross petition, claiming that certain defendants had conveyed their alleged interests to him, there can be no valid finding and decree in reference to the cross petition without legal notice of the filing thereof, or an appearance thereto by such defendants. The original petitioners, under section 7 of the act concerning partition, 2 R. S. 1876, p. 343, may dispute the right of such third person to appear if hostile to their interests, but they can not represent such defendants.

PLEADING.— *Written Instrument.*—The deeds through which one claims title are not the foundation of his action for partition or to quiet title, and copies thereof filed with the complaint can not be looked to in passing upon a demurrer to the complaint.

From the Tippecanoe Circuit Court.

I. N. Alexander and *J. A. Stein*, for appellant.

R. C. Gregory, *W. B. Gregory*, *J. W. Wilstach* and *J. A. Wilstach*, for appellee.

WOODS, J.—The appellant has assigned two errors, but his counsel have addressed their argument solely to the decision of the court in overruling the demurrer for want of facts to the appellee's complaint.

The original complaint, which purports to be a "complaint to amend decree and quiet title," was against Ellen Ketchum and her husband, Joshua Ketchum, and Ann Harris and her husband, Elijah Harris. Afterwards an amendment was permitted, whereby the appellant was made a defendant. Notice by publication to all the defendants was duly proven, and a decree taken against them *pro confesso*. The appellant afterwards appeared and procured an order opening up the decree and permitting him to defend, whereupon, over the objection of the appellee, but with the leave of the court, he filed a demurrer to the complaint, which the court overruled, and the appellant declining to answer over, though he had presented a verified answer to the merits with his petition for the opening up of the decree, the court gave judgment confirming the decree as originally entered.

The appellee now insists that the appellant was entitled to have the decree opened up only for the purpose of answering to the merits, and consequently that the court had no right to permit the filing of the demurrer, and that the ruling thereon presents no question for the consideration of this court.

The provision of the code, section 44, R. S. 1881, sec. 601, is: "But, before any judgment shall be opened, such party shall give notice to the original complainant," etc., "and shall file a full answer to the original complaint," etc.

While we are of the clear opinion that in such case a demurrer should not be entertained for any cause which would be deemed cured by the verdict, or in reference to which the complaint was amendable on the trial as a matter of course,

and on appeal would be treated as amended, yet, if the complaint is claimed to be fatally defective, the court may permit it to be tested by a demurrer, without waiting for a motion in arrest, to which the party clearly might resort.

As against the appellant, the complaint shows an unquestionably good cause of action to quiet the appellee's title to certain lands described, unless the averments made in reference to the proceedings and decree in partition, which decree it was sought to have corrected, are such as to nullify the title which it was sought to quiet.

A complete transcript of the proceedings and decree in partition is set out and embodied in the complaint, whereby it appears that Job E. Stevenson and four others presented a petition for partition against Edward O. Stevenson and a large number of others, including the said Ellen Ketchum and Ann Harris and their husbands, it being alleged in the petition that the respective parties each owned a certain designated interest in the lands sought to be partitioned, the interest of Mrs. Ketchum and Mrs. Harris each being stated as the one-twenty-sixth. Being non-residents, they and their husbands were notified by publication to answer the petition, but made default. Before this default was taken, though after the proof of publication against the non-resident defendants, the appellee King, in pursuance of leave of the court theretofore granted, having been admitted to defend, filed an answer and cross petition, alleging that the said defendants Harris and Ketchum had conveyed away their respective interests, and that, by certain *mesne* conveyances, he, the said King, had become the owner thereof, and asking that the same be set off to him in severalty. No notice of the filing of this cross petition was ever issued or published, and the original petitioners do not appear to have joined issue upon it.

The final decree recites the coming of "the parties heretofore appearing by their counsel, as heretofore," the default of the parties who did not appear, including the defendants Ketchum and Harris, "and now on motion and by agreement

of the parties appearing, and by reason of the default and decree *pro confesso* aforesaid, as to the defaulting defendants, this cause, for hearing and trial, is submitted to the court, without the intervention of a jury," etc.; and the court proceeds to enter a finding for the petitioners, specifying their respective interests and the interest of each defendant in the land as stated in the original petition, decrees partition and appoints commissioners, who report accordingly, confirms the report, and appoints a commissioner, who reports conveyances to the respective parties of the portion set off to each, which deeds the court approves—no reference to the name or cross petition of the appellee being made in the finding, orders or decree, but the interests, which he claimed to have derived from Mrs. Harris and Ketchum, being set off to them as their own.

In reference to these proceedings, thus set out in his complaint, the appellee avers that, through his mistake and inadvertence, the judgment of partition in said cause was made in favor of the said defendants Ellen Ketchum and Nancy Ann Harris, instead of in favor of the plaintiff, and the mistake carried into the commissioners' deeds for the lands before described; that he is still the owner in fee simple thereof and entitled to a deed of conveyance by a commissioner, to be appointed by the court for the purpose of correcting such mistake; that the defendant William Smith, one of the grantors in the plaintiff's chain of title, is asserting an interest adverse to the plaintiff's claim, but has in fact no interest. Wherefore, etc.

The appellant insists that this is not a good complaint for a review of the judgment, because no error is shown; that section 99 of the code does not apply, nor section 29 of the act concerning partition, 2 R. S. 1876, p. 350; and that, the case not coming within any of these provisions, the complaint is an effort to make a collateral attack upon the decree in the partition case; that, this attack not being permissible, the decree stands as a conclusive adjudication that the appellee had no interest in the land at the time of the decree, and that

his alleged interest belonged to Ellen Ketchum and Nancy Ann Harris.

Conceding, without deciding, that the appellee is without remedy so far as the effort to correct the decree is concerned, we do not concur in the proposition that he is estopped by force thereof from asserting title to the land. Estoppels must be mutual, and if the decree, as rendered, is conclusive against the appellee, it must be that if the decree had been in his favor, adjudging that he had become the owner of the shares of Ketchum and Harris, it would have been conclusive upon them; but the only notice given them was to answer the original petition, which conceded their interest, and it would be singularly unjust if, upon such a notice, a stranger to the original petition could come in and contest their right upon a cross petition of which they had neither actual nor constructive notice.

The statutory provisions on the subject are as follows:

"SECTION 1. That all persons holding lands as joint tenants or tenants in common, or tenants in coparcenary, may be compelled to divide the same in the manner provided in this act.

"SEC. 2. Any such tenant may apply to the circuit court, or court having probate jurisdiction of the county in which the lands, or any part thereof, may lie, by petition setting forth a description of the premises and the rights and titles therein of the parties interested.

"SEC. 4. It appearing to the court that such summons has been served ten days before the first day of the term, and when publication as aforesaid is required, that the same has been made thirty days previous to such term, the court shall proceed to hear and determine such petition.

"SEC. 5. Any person interested in such estate may appear and plead any matter tending to show that the petitioner ought not to have partition as prayed for, and the further pleadings shall be conducted as in actions at common law, until an issue in law or in fact shall be joined, which shall be determined as in other cases.

"SEC. 7. If any person not named in the petition shall appear and plead as a defendant, or allege any title to any part of the premises, the petitioner may reply that such person has no estate in the premises, and pray judgment if he shall be admitted to object to the petition, and the petitioner may likewise reply in answer to such plea, any other matter in manner as if he had not disputed such person's right to appear.

"SEC. 8. If it shall appear that such person has no estate in the lands, the matter of his plea shall be no further inquired of.

"SEC. 9. If upon trial of any issue, or upon default, or by confession or consent of parties, it shall appear that partition ought to be made, the court shall award an interlocutory judgment that partition be made to parties who may desire the same, specifying therein the share assigned to each, and taking into consideration advancements to heirs of a person dying intestate; and the residue of the premises shall remain for the persons entitled thereto, subject to a future partition.

"SEC. 15. The commissioners shall make to the court and acknowledge in open court, their report, specifying by divisions, or by metes and bounds, each share.

"SEC. 16. Such report, if confirmed by the court, shall be spread upon the order book, and judgment of partition be rendered accordingly. And such report and judgment shall also be recorded, in a separate book kept for that purpose.

"SEC. 29. Upon showing sufficient cause, any person not served with summons, may, within one year after such partition is confirmed, appear and open the proceedings and obtain a review thereof, and also any person of unsound mind, or an infant whose guardian did not attend and approve such partition, may, within one year after the removal of his disability, have a review of such partition."

Under section 7 the original petitioners may dispute the claim of any one not named in the petition who appears to assert an interest, and as between such person and the petitioners the determination of the issue will doubtless be conclusive; but we do not agree to the proposition of counsel

that the petitioner represents or has "authority to litigate for the interest of the true owners."

The decree in partition doubtless settles the rights of the petitioners as between themselves and as against the defendants named in the petition and served with process, and also the rights of the defendants as between themselves, perhaps, if they appear and it is done without objection; but it does not follow that a person not named in the petition may come in and claim the share of a defendant who is named, and who does not appear, and obtain a valid decree establishing his claim. There is nothing in the statute, and certainly not in the general rules of procedure, to warrant such a conclusion.

Counsel for the appellant insist further that when Mrs. Harris and Mrs. Ketchum made the conveyances under which the appellee claims title, they had no vested interest, and that their deeds were not operative upon the contingent interests which afterwards became in them vested rights, and were transferred to the appellant. The demurrer, however, does not raise the question. The averments of the original complaint show that the conveyances under which the appellee claimed were made after the rights of the grantors had become absolute, and, except for the copies of deeds set out in the amendment to the complaint, there is nothing to indicate the contrary. But, under numerous decisions, these exhibits can not be regarded in determining the meaning and sufficiency of the averments of the pleading with which they are set out. These deeds may have been the evidence of the appellee's title, but they were not the foundation of the action. And, even if they were, their dates would not control the allegation of the pleading as to the time when they were executed. If, therefore, the appellant would have presented the question of the power of Mrs. Harris and Mrs. Ketchum to convey, before the happening of the event on which their rights became perfect, and of the effect of the deeds which were made, they should have set up the facts in a special answer. It was enough for the appellee to have averred his title generally, and, as we have

seen, the particular averments contained in the amendment are not such as to destroy the force of the general averment contained in the original pleading.

Judgment affirmed, with costs.

No. 8377.

WHITE ET AL. *v.* ALLEN.

WILL.—*Construction.*—*Tenants in Common.*—*Partition.*—A will contained the following clauses: "*First.* I give and bequeath to my son, N. T.," certain real estate, describing it. "*Second.* * * To my daughter, A. A., twenty-five dollars in money. *Third.* * * To my beloved wife, R. T., all my land or real estate, of every description whatever, that I own at my death (not devised or given away in this will); also, all my personal property, * * to have, use and control during all her natural lifetime, and after her death * * to my six children, * * except that my son, N. T., is to have an equal share in the personal property with the other children; if any of my said seven children shall die without bodily heirs, then the others to have the share or shares, both real and personal, of the deceased ones, equally divided."

Held, that the third clause does not affect any property disposed of by the first and second clauses.

Held, also, the testator having died leaving a widow and eight children, that upon the death of the widow and N. T. without issue, and subsequently the death of M. T., a son named in the will, leaving an only child, J. T., the land devised by the first clause of the will to N. T. belongs to A. A., J. T., the daughter of M. T., and the brothers and sisters of N. T. as tenants in common, each entitled to a one-seventh part thereof.

From the Perry Circuit Court.

C. H. Mason, for appellants.

C. A. DeBruler, *E. R. Hatfield* and *W. Henning*, for appellee.

BICKNELL, C. C.—The appellee, a daughter of Nathaniel H. Thomas, brought this suit for partition against the appellants, who were brothers and sisters, and the only child of her deceased brother. The complaint demanded partition

of fifty-six acres of land, and twenty-three and three-quarters acres of land; the appellee claimed to be entitled to one-seventh part of said lands. There was a trial by the court, followed by a finding and judgment for the appellee, and an appeal to this court.

The parties agree that the only question in the case arises upon the construction of the will of said Nathaniel H. Thomas. The appellants say in their brief: "If the court below did not err in its judgment in construing the will, there is no error worthy of any attention, unless the court shall think the language of the will sufficiently ambiguous and uncertain to authorize the admission of the parol testimony offered by the appellants to explain it, and rejected by the court." There was no ambiguity or uncertainty in the will, and the parol testimony was properly excluded.

The appellee claimed that the lands aforesaid were devised by said will to her brother Nathaniel, and upon his death descended so that the appellee and the appellants became tenants in common, each entitled to one-seventh part thereof.

The appellants claimed that said lands were not devised to Nathaniel, the son, in fee, but in case of his death were to go to the appellants, and that the appellee was entitled to nothing under the will except a legacy of twenty-five dollars.

It was agreed that Nathaniel H. Thomas died on January 23d, 1879, leaving a widow Rebecca, and eight children, to wit: the appellants, Lydia A. White, George W. Thomas, Columbus Thomas, Clemency A. Harris, Eliza J. Roff, and two others, viz., Nathaniel and Marion J.

The will contained the following provisions:

"First. I give and bequeath to my son, Nathaniel Thomas," —then follows a description by metes and bounds of both of the aforesaid tracts of land.

"Second. I give and bequeath to my daughter, Amanda Allen, twenty-five dollars in money." This was a legacy to the appellee, whose name was Sarah Amanda Allen.

"Third. I give and bequeath to my beloved wife, Rebecca Thomas, all my land or real estate, of every description whatever, that I own at my death (not devised or given away in this will); also, all my personal property, including money, notes, accounts and effects, of whatever name or nature (except what is given and bequeathed in this will), to have, use and control during all her natural lifetime, and after her death all of said property that yet remains, both real and personal, I do hereby give and bequeath," etc.

These words, "after her death all of said property that yet remains, both real and personal," refer exclusively to the property just mentioned in said third clause, and not to any other property elsewhere in the will disposed of. The use of the words "after her death" shows that the reference is to property which had been hers for life, and not to property given to others absolutely in the first and second clauses of the will, and in which she had no estate for life.

The will means that the real and personal property, given to the wife for life, shall, after her death, go to others, and the will proceeds thus: "To my six children, to wit, Marion J. Thomas, Lydia Ann White, George W. Thomas, Columbus Thomas, Clemency Ann Harris, and Eliza J. Roff, to be equally divided between them six, share and share alike." Thus far the appellee and the son, Nathaniel, are cut off from any participation in the property given to their mother for life; but the will proceeds: "except that my son, Nathaniel Thomas, is to have an equal share in the personal property with the other children, except what Mary Gilbert now owes me, he is not to have any share in that." Here the will gives the son, Nathaniel, an equal interest, after his mother's death, in the personal property she had for life, but not in the real estate she had for life. And then the will says: "If any of my said seven children," that is, the six named in this third clause of the will, and Nathaniel, leaving out the appellee, naming the seven only who are to take the "said property," that is, the property given to their mother for life, "shall die without

bodily heirs, then the others to have the share or shares, both real and personal, of the deceased ones, equally divided, share and share alike."

The "shares of the deceased ones," thus to be divided, mean their shares of the property which their mother had for life; it is that property only which is the subject of disposition in said third clause; nothing in the third clause has any reference to the property previously disposed of in the first and second clauses.

It was further agreed by the parties, that Nathaniel Thomas, the son, died unmarried, without issue, on February 24th, 1879, about a month after the testator died, and that Marion J. Thomas died on February 28th, 1879, leaving an only child, the appellant Jennie Thomas, and that the widow, Rebecca Thomas, died on March 1st, 1879.

Upon the death of Nathaniel, the son, the property devised to him in clause One of the will descended to his brothers and sisters and mother, she taking one-half and they the other half as tenants in common, under section 3 of the law of descents. On the death of Marion J. Thomas, what he inherited from Nathaniel descended to his only child, the appellant Jennie Thomas. On the death of the widow, the realty and personalty held by her for life, under clause Three of the will, went to the surviving children, except the appellee, and to the granddaughter Jennie, in equal shares, and the one-half of the property, taken by Nathaniel, the son, under the first clause of the will, and which descended to his mother, the widow, was inherited upon her death by the appellee and the appellants, in equal shares, so that after the death of said Rebecca Thomas the appellee and the appellants were tenants in common of said fifty-six acres and of said twenty-three and three-fourths acres, each entitled to one-seventh part thereof.

The judgment of the court below ought, therefore, to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellants.

No. 8921.

McGlothlin et al. v. Pollard.

Married Woman.—*Inchoate Interest in Husband's Land Sold on Foreclosure. —Mortgage.—Vested Right.—Act of 1875 Construed.*—When a man's land has been sold upon foreclosure of a mortgage made by him alone before the passage of the act of 1875, Acts 1875, p. 178, the inchoate interest of the wife is not affected by that law. The vested right of the mortgagee could not be impaired by an enlargement of the inchoate right of the wife.

Same.—*Redemption.—Wife's Transfer of Right.—Party.*—If a wife is not made a party to a foreclosure against the husband, her right to redeem from a sale under the decree continues unaffected, and this right she may transfer to another, by joining her husband in the execution of a deed.

From the Carroll Circuit Court.

A. J. Roush, J. M. Larue and *F. B. Everett,* for appellants.

J. Applegate, for appellee.

Woods, J.—The appellee obtained a judgment against the appellants for the recovery of the possession of certain real estate, subject to a right of redemption by the appellant John McGlothlin. The question presented for decision is whether the finding and judgment of the court are sustained by the evidence, which consists of an agreed statement of the facts. The exact point in dispute may be apprehended from the following statement:

On the 10th day of April, 1871, Joshua Harris, being the owner of the land in question, executed to Wesley Kipp a mortgage for unpaid purchase-money, a previous mortgage in which Harris' wife had joined being that day satisfied of record, and the new mortgage given instead, the wife not joining in its execution. This mortgage was foreclosed on the 25th day of September, 1877, against Harris alone, his wife not being made a party to the action, and by virtue of the decree the property was sold to the appellee on the 23d day of February, 1878, for the full amount of the decree, which the appellee paid and received a certificate of purchase, and

at the end of the year, there having been no redemption, received of the sheriff a deed for the property. On September 7th, 1878, within the year allowed for redeeming from the sale, the appellant McGlothlin, with notice of the foregoing facts, procured a deed for the premises from Harris and his wife, and under that deed received and was holding possession of the property at the commencement of the suit, claiming such right and only such right as he acquired by virtue of said conveyance.

The proposition of the appellants is, that, under the act of March 11th, 1875, Acts 1875, p. 178, the inchoate interest of Mrs. Harris, upon the consummation of the sheriff's sale, became a vested undivided one-third interest in fee simple, which she had conveyed to him. We do not concur in this proposition. By his purchase at the foreclosure sale, the appellee acquired all the interest which Harris, at the time the mortgage was made, was able to convey or mortgage. The mortgage was made in 1871, when the wife's inchoate interest, as then defined by law, could become a vested right only upon the death of the husband, and in case she survived him; and, subject only to this contingent interest, the deed or mortgage of the husband operated upon the entire estate. The right of the mortgagee in this instance, therefore, was of such a character, having become vested at once upon the execution of the mortgage contract, that the obligation and effect of it could not be impaired or diminished by subsequent legislation.

It has been held that in lands sold to satisfy a judgment rendered upon a contract made before the passage of the law of 1875, the wife's inchoate interest, by virtue of that law, vests upon the transfer of the title to the purchaser, *Taylor* v. *Stockwell*, 66 Ind. 505; but to allow such result in cases of a mortgage or other specific lien, created by or arising out of a contract made before the passage of the law, would be a plain disregard of the constitutional inhibition whereby the States are forbidden to pass any "law impairing the obligation of contracts." Const. U. S., art. 1, sec. 10.

The purchaser under the decree of foreclosure, of course, acquired the entire interest which was covered by the lien of the mortgage.

By reason of the fact that Mrs. Harris was not made a party to the action, her right to redeem was not affected by the decree; and whatever right in this respect the appellant acquired by virtue of her conveyance of the land to him, the court protected in the judgment which was rendered. During the life of the husband, at least, she has no right of possession, and, of course, could convey no such right to another.

Judgment affirmed, with costs.

No. 8797.

Rice v. Puett et al.

Sheriff's Sale.—*Redemption.—Real Estate, Action to Recover.—Possession.*—In ejectment, a purchaser at sheriff's sale, from which redemption has been made under the statute, is not entitled to possession upon the ground that he had redeemed from a sale made upon a senior mortgage. His right as such redemptioner is not to possession of the lands, but to a lien thereon for his redemption money and interest, which he may enforce by suit for its recovery.

Same.—*Owner of Equitable Title May Redeem.—Mortgage.—Notice.*—One who has an equitable title only to the right of redemption might, under the statute of 1879, Acts 1879, p. 176, redeem lands from a sheriff's sale upon a decree foreclosing a mortgage, and the fact of his having paid the money to redeem was notice to the purchaser at sheriff's sale of the facts upon which his right to redeem was based.

Same.—*Mistake.—Description.*—One who had purchased and paid for the mortgagor's title and taken a deed which, by mistake, did not describe the land, might, under the act of 1879, redeem from a sheriff's sale upon a decree foreclosing a mortgage.

From the Parke Circuit Court.

T. N. Rice, J. T. Johnston and *D. H. Maxwell,* for appellant.

S. D. Puett, for appellees.

MORRIS, C.—This suit was brought by the appellant against the appellees, to recover the possession of certain real estate situate in Parke county, and alleged to be unlawfully detained by the appellees. The complaint consists of two paragraphs.

The first paragraph is in the usual form. The second states that the appellant, on the 21st day of March, 1877, by the consideration of the Parke Circuit Court, obtained a decree of foreclosure for $499, upon a mortgage executed by David R. Stith and Emily, his wife, to the appellant, upon the land in dispute, together with costs of suit; that he caused a copy of said decree and an execution to be duly issued by the clerk of said court, directed to the sheriff of Parke county, by virtue of which said sheriff, on the 25th day of May, 1878, after having duly advertised said land for sale, in due form of law, sold the same to the appellant for $55, and executed and delivered to him a proper certificate of purchase for said land; that on the 27th day of May, 1879, said land, not having been redeemed from said sale, was duly conveyed by said sheriff to the appellant, who is now the owner of said land in fee, and entitled to the possession of the same. It is further stated that on the 25th day of May, 1878, said Stiths were not in the actual occupation of said land, but that it was then, and ever since has been, occupied by the appellees as tenants of the appellant as such purchaser; that the rents of said land were reasonably worth $500 per year. The appellant asks judgment for the possession of the land and $1,050 for the rents and use of the same.

The appellees demurred to each paragraph of the complaint. The demurrers were overruled.

The appellees thereupon filed what they call an answer and cross complaint in one paragraph, in which they admit that the appellant obtained a decree of foreclosure, order of sale and execution as alleged in the second paragraph of his complaint, and that he duly purchased said land at sheriff's sale at the time, and as stated in said paragraph, and obtained a

certificate of purchase for said land; that by virtue of said sale and certificate the appellant would have been entitled to a sheriff's deed for said land at the expiration of one year from said sale, had not said land been redeemed. It is further averred that, shortly after said decree of foreclosure was obtained, said David R. Stith, the mortgagor, was, upon the petition of his creditors, duly declared and adjudged a bankrupt by the District Court of the United States for the District of Indiana; that one Horace B. Jones was duly elected his assignee in bankruptcy; that as such assignee, pursuant to an order of said court made on the 11th day of June, 1877, directing the sale of said real estate, in the appellant's complaint described, at private sale, the said Jones, as such assignee, sold, at private sale, said real estate to one Charles E. Hasford, for the sum of $100, and on the 12th day of June, 1877, duly conveyed the same to said Hasford; a copy of the deed is filed as an exhibit with the answer, and is alleged to have been duly recorded in said Parke county on the 21st day of June, 1877. It is further stated that said Hasford, on the 31st day of January, 1877, sold and conveyed his interest in, and title to, said real estate to the appellees; that they thereupon took possession of the same. It is further stated that the assignee, in executing the deed for said land to said Hasford, misdescribed the land, by inserting therein, by mistake and oversight, the word "south" for the word "east," but that he afterward on the 29th day of May, 1879, corrected said mistake, by executing to the appellees a new deed for said land; that on the 24th day of May, 1879, before the year of redemption had expired, the appellees paid to the clerk of said Parke Circuit Court the sum of $60.50, the amount paid by the appellant to the sheriff as purchase-money for said real estate, with ten per cent. interest thereon, for the redemption of said land from the sale made to the appellant, and that the clerk thereupon made the following endorsement and receipt therefor on the judgment docket wherein said judgment was entered, and said sale was recorded,

viz.: "Land sold May 25th, 1878, to H. J. Rice for $55.

"Teste: DAVID STROUSE, Clerk."

"May 24th, 1879, received of Samuel D. Puett and John J. Thomas $60.50, the amount necessary to redeem land sold on this judgment, May 25th, 1878.

"DAVID STROUSE, Clerk."

That afterward the appellant, knowing the foregoing facts, wrongfully procured from the sheriff of said county a deed for said land. The prayer of the cross complaint is, that the deed of the sheriff to the appellant may be set aside, and for all other proper relief.

To this answer and cross complaint the appellant demurred. The court overruled the demurrer.

The appellant then filed an answer to the cross complaint, in which he states that, on the 21st day of March, 1877, the Ætna Life Insurance Company obtained in said court a decree of foreclosure for $4.579.20 and costs of suit, upon a mortgage executed by said Stith and wife to said company on the land described in the appellant's complaint, and an order for the sale of the same; that on the 26th day of May, 1877, the Ætna Life Insurance Company purchased said land at sheriff's sale, made upon a copy of said decree and an execution issued thereon by the clerk of said court, directed to said sheriff of said county of Parke, and upon due notice of the time and place of said sale, for the sum of $4,751.83, and obtained from said sheriff a proper certificate of purchase therefor; that the appellant was made a party to the suit in which said insurance company obtained said decree of foreclosure; that before the year of redemption had expired, to wit, on the 25th day of May, 1878, he redeemed said land from the sale made to said company, by paying into the clerk's office of said county the sum of $5,238, being the amount of the purchase-money and ten per cent. interest thereon, and that the appellees, claiming to hold and own, by assignment, the certificate of purchase executed by said sheriff to said company, received and accepted the money paid by him to said clerk, as and for the redemp-

tion of said land from said sale; that, at the time the appellees pretended to redeem said land, they did not pay nor offer to pay to the appellant, nor to the clerk of said court for him, said $5,238, which he had paid and they had received for the redemption of said land from said sale made to said Ætna Life Insurance Company.

To this answer to the cross complaint, the appellees demurred. The court sustained the demurrer. The appellant elected to stand by his pleading, and final judgment was rendered for the appellees.

The errors assigned question the rulings of the court upon the several demurrers.

The questions presented for decision are:

1st. Had the appellees, upon the facts stated in the pleadings, a right to redeem from the appellant's sale?

2d. If so, did they pay to the clerk a sufficient sum to effect a redemption from said sale?

It will not be questioned but that David R. Stith, the mortgagor and judgment debtor, had the right to redeem from both the sale made to the Ætna Life Insurance Company and that made to the appellant within the time limited by law. This right of redemption was transferable; upon Stith's being declared a bankrupt and his assignee appointed, his interest in the land and right of redemption passed by operation of law to and vested in his assignee in bankruptcy. It is alleged in the cross complaint that an assignee of the estate of said Stith was duly appointed, and that, by the order of the proper bankrupt court, the assignee sold and conveyed the land in dispute to one Hasford, on the 12th day of June, 1877, shortly after the sale made by the sheriff to the Ætna Life Insurance Company. On the 31st day of January, 1877, Hasford sold and conveyed said land and all the right which he derived from the assignee's sale, to the appellees.

But in the assignee's deed to Hasford a mistake occurred in the description of the land. On the 29th day of May, 1879, after the appellees claimed to have redeemed from the appel-

lant's sale, the assignee in bankruptcy corrected the mistake in the description of the land by executing a new deed.

The appellant insists that as the deed to the appellees had not been corrected so as properly to describe the land, and recorded before he obtained his deed, he must be regarded as an innocent holder of the title to the land; that not having notice that the appellees had succeeded to the right of the mortgagor to redeem until after the year of redemption had expired and he had obtained his deed, he was at liberty to disregard the redemption attempted to be made by the appellees. The sale made by the assignee in bankruptcy, and the receipt of the purchase-money by him, equitably passed to the purchaser all his rights in the land; thenceforward, he held the naked legal title in trust for the purchaser. He sold the land and received the purchase-money. It was his duty to convey the land sold to the purchaser. If, by mistake, he had failed to do this, he had not performed the contract of sale on his part, and, upon application to the proper court, he would be compelled to make a proper conveyance to the purchaser. This he might and did do, without compulsion. It was a matter between him and the purchaser. Hasford, the purchaser, in January, 1877, sold and conveyed the land to the appellees. The conveyance passed his equity in the land to them. Thus, having the complete equity to all the rights and interests which the mortgagor, had he not become a bankrupt, would have had in the land, the appellees had a right to redeem.

It was the act of redemption—the payment of the money for that purpose to the proper clerk for the redemption of the land—and not the record of the deed which gave the right to redeem, that fixed notice of the redemption upon the appellant. The money had been paid to the clerk and the fact properly entered of record by him. The appellant was bound to notice at his peril the fact. We conclude, therefore, that, upon the facts stated, the appellees had the right to redeem, and that there was no error in overruling the demurrer to the cross complaint.

Could they redeem from the sale made upon the decree of foreclosure taken by the appellant against the Stiths, without paying to the clerk, for the benefit of the appellant, the $5,238 paid by him to redeem from the sale made on the 26th day of May, 1877, to the Ætna Life Insurance Company?

The appellant insists upon the following propositions:

1st. That he having redeemed from the sale made to the Ætna Life Insurance Company, on the 25th day of May, 1877, and within one year from the day of sale, and the appellees, as the assignees of said company, having received the money by him paid in redemption, have, as such assignees, no further lien on the land.

2d. That the assignee of the equity of redemption stands in no better position than the judgment debtor.

3d. That as to persons made parties to the proceedings to foreclose, upon a sale by the senior incumbrancer, all are called upon and required to redeem within one year from the sale; that there is, in this respect, no difference between the judgment debtor and junior incumbrancers.

These propositions may, perhaps, be conceded. We think it quite clear that the acceptance of the redemption money terminated the interest of the appellees in the land, as the assignees of the Ætna Life Insurance Company. We think it equally clear that the appellees, as successors to the interests of David R. Stith in the land, have no greater rights than he would have, had his interest in the land never passed from him by his bankruptcy, nor do we think that they can or could redeem from the first sale after the year had expired.

But the question remains: What was the effect of the appellant's redemption from the sale made to the Ætna Life Insurance Company? what right to and interest in the land did the redemption give him?

This question seems to be answered by the statute in force at the time the sale and redemption took place. The third section of the act of 1861, 2 R. S. 1876, p. 220, section 3, provides:

"Where any mortgagee or judgment creditor shall redeem any real property or interest therein under the provisions of this act, such mortgagee or judgment creditor shall retain a lien on the premises for the amount of money so paid for redemption against the owner and any junior incumbrancer."

As the rights of the appellant as redemptioner depended upon the statute, it would seem to be clear that by redeeming he secured no title to the land, but simply a lien, superior to all others, on the land; but he could not by force of this lien, without enforcing it by sale of the premises, demand or obtain, as against the judgment debtor or his assignees, the possession of the premises. The title which would have become absolute in the purchaser, had there been no redemption, was, through the redemption, revested in the judgment debtor, or his assignees, and held as if no sale had been made, subject to the lien of the redemptioner for the redemption money paid by him.

It appears from the facts stated, that the appellant redeemed the land from the sale made to the Ætna Life Insurance Company, on the same day that he purchased it at sheriff's sale, not on the decree in favor of the insurance company, but upon the decree for $499, foreclosing a mortgage executed to him by the Stiths. Whether the redemption was effected before or after the sale does not appear.

It is not necessary to determine the precise interest which passed to the appellant by the sale made by the sheriff to him upon the decree foreclosing his mortgage. If no interest in the land passed by such sale, then there was no error in sustaining the demurrer to the appellant's answer. For, in that case, he would have no title or right to the possession of the land. He obtained no such right merely by the redemption made on the 25th of May, 1878.

The appellees, as the assignees of Stith, the mortgagor and judgment debtor, attempted to redeem on the 24th day of May, 1879, from the sale made to the plaintiff on a decree foreclosing a mortgage executed to him, recovered on the —

day of ———, 1877. At the time this attempt to redeem was made, the act of 1879, amending the redemption law of 1861, was in force. The act of 1879 repealed so much of the law of 1861 as was in conflict with its provisions. Both acts secured to the debtor the right to redeem his real estate sold at sheriff's sale. In this respect there is no difference between the two acts. The act of 1879 provides that before the judgment debtor, his executors or administrators, or any person who has the title of the judgment debtor, shall have redeemed, "any judgment creditor having a lien, or a mortgagee, whose mortgage, at the time of his redemption, shall have been recorded, may redeem the property sold by paying to the clerk, for the use of the purchaser, his purchase-money, with ten per cent. interest; or, if any such creditor shall have redeemed, then by paying to the clerk, for the use of the last redemptioner, his redemption money with interest as aforesaid, and the cost of redemption, and also the debt, interest and costs on account of which the prior redemption shall have been made." These provisions do not apply to this case, first, because the appellees are neither judgment creditors nor mortgagees; secondly, for the reason that they are not redeeming from the redemption made by the appellant, but from a sale made to him by the sheriff. Nor do any of the provisions of the act of 1879, except the second section, which is substantially the former law, apply.

The sale made by the sheriff to the appellant did not wipe out or impair the lien upon the land in dispute acquired by redeeming from the sale made to the Ætna Life Insurance Company. That lien, for anything that appears in the record, still exists, and may be enforced at any time. Had some one else than the appellant bought the land at the last sale for $55, it would not be pretended that the appellant's lien for his redemption was thereby extinguished. The fact that the appellant was the purchaser, instead of a third person, does not change the effect of the sale.

The appellant caused the land to be sold upon a decree in

his favor; it was the only sale made on such decree. This decree was distinct from that upon which the previous sale had been made. When the last sale was made, the purchaser took the property subject to the lien in favor of the appellant for the money paid by him to redeem the land from the former sale, and subject also to the right of his mortgagor, or those having his title to redeem.

The appellees were not seeking to redeem from the appellant as redemptioner, nor from his redemption. They did not wish to acquire his rights as redemptioner, but his rights as purchaser at sheriff's sale, on an execution and order of sale made to enforce a decree distinct and different from that on which the purchase from which he had redeemed was made. This, we think, they had the right to do.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

No. 8537.

BALLARD, ADM'R, *v.* THE FRANKLIN LIFE INSURANCE COMPANY.

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FORMER ADJUDICATION.—*Grounds of Defence.*—A matter finally determined by a competent tribunal is considered forever at rest, and the adjudication includes every ground of defence which might have been litigated in the case.

SAME.—*Promissory Note.—Answer of Fraudulent Alteration.—Reply.*—Where in an action upon a promissory note the maker answers a fraudulent alteration by the plaintiff, as adjudicated in a former action thereon, a reply that the alteration, if made at all, was made by the plaintiff's collecting agent without her fault, knowledge, connivance or consent, is bad.

SAME.—*Alteration.—Spoliation.*—The alteration of a note by the payee, whereby it is made payable at a bank in this State, is material and avoids the note, but an alteration by a stranger, or by an agent not having authority, is a mere spoliation, which does not release the parties.

Ballard, Adm'r, v. The Franklin Life Insurance Company.

SAME.—*Fraudulent Alteration.*—A fraudulent alteration by the payee of a promissory note will prevent him from recovering either on the note or on the original consideration.

From the Henry Circuit Court.

D. W. Chambers, J. Brown and *M. E. Forkner*, for appellant.

H. Milligan, for appellee.

BICKNELL, C. C.—The appellee brought this action against Henry Minnesinger upon the following account:

"For premium upon life insurance policy $200 00
"For interest on same . . . . . 50 00"

The answer was:

First. The general denial.

Second. Payment.

Third. That defendant gave plaintiff a note for said cause of action, which note was afterwards fraudulently altered by plaintiff, so as to make it payable at a bank in Indiana, and suit was brought upon it by plaintiff against defendant, in the Henry Circuit Court, in which suit the defendant recovered judgment that the note was void because of said fraudulent alteration.

Fourth. That defendant gave his note as aforesaid, and plaintiff brought suit against defendant in said court, upon it and another note of defendant, which notes together were for $350; that defendant pleaded a set-off for $375.50; and, upon the issues thereon joined, plaintiff recovered a judgment for $87.32.

Fifth. That plaintiff, at the September term, 1877, of said court, brought suit upon this same cause of action, and recovered judgment thereon for $87.32, against the defendant.

The plaintiff replied:

First. In denial.

Second. That the note, mentioned in the third paragraph of said answer, was altered, if at all, by one L. L. Boblett, the plaintiff's collecting agent, without the plaintiff's fault, knowledge, connivance, or consent.

Third. For further reply to said third paragraph of an-

swer, that defendant was indebted on account as alleged, and plaintiff delivered said note for collection only, to Lycurgus L. Boblett; that, in settlement of said account, defendant executed said note and delivered it to Boblett, who, without the knowledge or consent of plaintiff, altered said note as alleged in said answer, and that plaintiff knew nothing of said alteration until after she had brought suit upon the note, and never ratified or consented to said alteration.

Demurrers to the second and third paragraphs of said reply were overruled. The issues were tried by a jury who returned a verdict for the plaintiff for $186.13.

The defendant's motion for a new trial was overruled, judgment was rendered upon the verdict and the defendant appealed. He assigns errors as follows:

1st. In overruling the demurrers to the second and third paragraphs of the reply.

2d. In overruling the motion for a new trial.

The replies in controversy were pleaded to the third paragraph of the answer, which alleged a fraudulent alteration of the note by the plaintiff, a suit upon the note by plaintiff against the defendant, and a judgment therein for defendant, that the note was void by reason of such fraudulent alteration. The replies aver that the note was not altered by the plaintiff, but by a third person without the plaintiff's knowledge or consent. The substance of these replies was embraced in the denial already pleaded. The replies, however, were bad without reference to the previous denial.

The note was not negotiable under the law merchant, and was not given and received in payment of the account; therefore, ordinarily, if the note were not paid, the plaintiff might have recovered upon the account. *Alford* v. *Baker*, 53 Ind. 279; *Tyner* v. *Stoops*, 11 Ind. 22. Here, however, was a fraudulent alteration; an alteration by the payee, making the note payable at a bank in Indiana, avoids the note. *McCoy* v. *Lockwood*, 71 Ind. 319. An alteration by a stranger, or

by an agent not having authority, is a mere spoliation, which does not release the parties. *Brooks* v. *Allen*, 62 Ind. 401. A fraudulent alteration by the payee will prevent him from recovering either on the note or on the original consideration. *Martendale* v. *Follet*, 1 N. H. 95; *Clute* v. *Small*, 17 Wend. 238, 242.

The judgment in the former suit ascertained the fact that there had been a fraudulent alteration of the note by the payee. These replies seek to avoid the effect of that judgment by raising an issue which might have been raised, and, for aught apparent on the pleadings in this suit, actually was raised and determined in the former suit. The legal effect of the former judgment can not be impeached or obviated in any collateral proceeding.

A question once decided between the parties upon the same cause of action, by the judgment of a court of competent jurisdiction, can be reversed or reconsidered only by a direct proceeding for that purpose; and, in general, no allegation or evidence, tending to impeach a judgment, will be admitted in any subsequent distinct controversy between the parties. When a matter is finally determined by a competent tribunal, it is considered as forever at rest, not only as to what was actually determined, but as to every other matter which the parties might have litigated in the case. *Fischli* v. *Fischli*, 1 Blackf. 360 (12 Am. Dec. 251). And the rule is the same where a suit is sought to be sustained upon allegations which would have been a good defence in a previous action between the parties. In *Marriott* v. *Hampton*, 7 Term Reports, 265, LAWRENCE, J., said: "It goes the length of establishing this, that every species of evidence, which was omitted by accident to be brought forward at the trial, may still be of avail in a new action to overhale the former judgment; which is too preposterous to be stated." See also *Moody* v. *Thurston*, 1 Strange, 481; *Bateman* v. *Willoe*, 1 Sch. & L. 201; *Le Guen* v. *Gouverneur*, 1 Johns. Cas. 436; *Grant* v. *Button*, 14 Johns. 377;

Holden v. *Curtis*, 2 N. H. 61; *Thatcher* v. *Gammon*, 12 Mass. 268; *Shriver* v. *The Commonwealth*, 2 Rawle, 206.

The court therefore erred in overruling the demurrers to the second and third replies, and as the judgment must be reversed and a new trial awarded for these errors, it is unnecessary to consider the reasons alleged in support of the motion for a new trial.

Per Curiam.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and it is hereby in all things reversed, at the costs of the appellee, and this cause is remanded, with instructions to the court below to sustain the demurrers to the second and third paragraphs of the reply.

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No. 8529.

Swan et al. v. Timmons et al.

Injunction Bond.—*Action on.—Judgment in Another Action not a Bar.—Transcript.—Evidence.—Damages.*—On trial of an action on an injunction bond, a transcript of the record of another subsequent action, wherein the defendant obtained the injunction sought, is not admissible in evidence to bar the action, nor in mitigation of damages.

Same.—*Measure of Damages.—Attorney's Fees.*—The dismissal of an action in which an injunction bond was given entitles the defendant to recover his expenses incurred in making the necessary resistance to that action, including reasonable attorney's fees; but, if other relief was sought, the attorney's fees must be restricted to those necessarily incurred in defeating the injunction.

From the Jasper Circuit Court.

D. E. Straight and *U. Z. Wiley*, for appellants.

S. P. Thompson and *D. J. Thompson*, for appellees.

Elliott, C. J.—The questions presented by this appeal arise upon the ruling refusing appellants a new trial.

In order to understand the questions requiring consideration, it is necessary to give a synopsis of the evidence. In

April, 1875, the appellee Henry Timmons obtained a judgment against the appellant John W. Swan; in June, 1877, an execution was issued on this judgment, and an action for an injunction to restrain its enforcement commenced by the appellant in the Benton Circuit Court; no order, however, was obtained afterwards, but before the dismissal of the action in the Benton Circuit Court, appellant instituted another action for the same cause, and seeking the same relief, in the Circuit Court of Warren county. To this latter action the appellee pleaded the pendency of the former action, and the appellant was compelled to dismiss his suit. In the action brought in Warren county, the injunction bond, upon which this action is founded, was executed and filed.

On the trial of the present cause, the appellant offered in evidence a transcript of the proceedings in a subsequent suit for injunction, wherein he obtained a decree, perpetually enjoining the enforcement of the judgment of the appellee.

The fact, that the appellant subsequently obtained an injunction, can not defeat this action. The failure in the action in which the bond was executed gave the appellee a right to some damages. The measure of damages in cases where the failure to sustain the application is solely because of another action pending, may be, and perhaps is, different from that in which the failure is because of a want of meritorious ground for relief; but, however this may be, it is plain that there is some right of action in such cases. 2 High Injunctions, sec. 1624; 2 Sedgwick Measure of Damages, 208. The excluded evidence was clearly not admissible in bar of the action, for the reason that the appellee was entitled to recover the expenses incurred in securing its dissolution.

Was this record admissible in mitigation of damages? If the appellee was seeking a judgment for some loss by reason of the delay occasioned by the injunction, then the evidence would probably have been competent. In *Andrews* v. *The Glenville Woolen Co.*, 50 N. Y. 282, it was said: "On an assessment of damages, caused by an injunction which restrains

legal proceedings for the collection of a demand, it is not competent to go into the merits of the proceedings restrained, unless, perhaps, in a case where the party prosecuting the reference claims as damages the loss of his demand; where, as in this case, he merely seeks to recover his expenses of getting rid of the injunction, the merits of the proceeding restrained are not a proper subject of inquiry. If the restraint was wrongful the party restrained had a legal right to have it removed, and is entitled to his expenses reasonably incurred in establishing that right."

In dismissing his suit for an injunction, the appellant confessed that he had at that time no legal or equitable right to the relief sought, and the dismissal was a breach of the bond. *Reeves* v. *Andrews*, 7 Ind. 207; *Dowling* v. *Polack*, 18 Cal. 625; *Loomis* v. *Brown*, 16 Barb. 325. Where a party applies for an injunction and is forced to a dismissal by a plea in abatement, he can not, in an action upon the bond, have his right to another injunction determined. The dismissal of the action in which the bond was executed is such a breach as vests in the obligee a right of action for expenses incurred in making the necessary resistance; and in estimating damages in such a case, it is proper to take into consideration such reasonable attorney's fees as may have been necessarily paid, or contracted for in making the proper resistance. *Beeson* v. *Beeson*, 59 Ind. 97; *Raupman* v. *The City of Evansville*, 44 Ind. 392. As the appellee was entitled to recover such expenses as he incurred in opposing the application, and as he seeks no recovery on account of injury inflicted by the operation of the restraining order, the proceedings in the subsequent action wherein the merits of the controversy were determined were clearly not competent.

The case of *Jenkins* v. *Parkhill*, 25 Ind. 473, is not here in point. In that case a recovery was sought for injury resulting from the operation of the injunction; but here there is no such relief asked. The evidence and the instructions show that the only damages sought were such as grew out of the

day of ———, 1877. At the time this attempt to redeem was made, the act of 1879, amending the redemption law of 1861, was in force. The act of 1879 repealed so much of the law of 1861 as was in conflict with its provisions. Both acts secured to the debtor the right to redeem his real estate sold at sheriff's sale. In this respect there is no difference between the two acts. The act of 1879 provides that before the judgment debtor, his executors or administrators, or any person who has the title of the judgment debtor, shall have redeemed, "any judgment creditor having a lien, or a mortgagee, whose mortgage, at the time of his redemption, shall have been recorded, may redeem the property sold by paying to the clerk, for the use of the purchaser, his purchase-money, with ten per cent. interest; or, if any such creditor shall have redeemed, then by paying to the clerk, for the use of the last redemptioner, his redemption money with interest as aforesaid, and the cost of redemption, and also the debt, interest and costs on account of which the prior redemption shall have been made." These provisions do not apply to this case, first, because the appellees are neither judgment creditors nor mortgagees; secondly, for the reason that they are not redeeming from the redemption made by the appellant, but from a sale made to him by the sheriff. Nor do any of the provisions of the act of 1879, except the second section, which is substantially the former law, apply.

The sale made by the sheriff to the appellant did not wipe out or impair the lien upon the land in dispute acquired by redeeming from the sale made to the Ætna Life Insurance Company. That lien, for anything that appears in the record, still exists, and may be enforced at any time. Had some one else than the appellant bought the land at the last sale for $55, it would not be pretended that the appellant's lien for his redemption was thereby extinguished. The fact that the appellant was the purchaser, instead of a third person, does not change the effect of the sale.

The appellant caused the land to be sold upon a decree in

his favor; it was the only sale made on such decree. This decree was distinct from that upon which the previous sale had been made. When the last sale was made, the purchaser took the property subject to the lien in favor of the appellant for the money paid by him to redeem the land from the former sale, and subject also to the right of his mortgagor, or those having his title to redeem.

The appellees were not seeking to redeem from the appellant as redemptioner, nor from his redemption. They did not wish to acquire his rights as redemptioner, but his rights as purchaser at sheriff's sale, on an execution and order of sale made to enforce a decree distinct and different from that on which the purchase from which he had redeemed was made. This, we think, they had the right to do.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

No. 8537.

BALLARD, ADM'R, v. THE FRANKLIN LIFE INSURANCE COMPANY.

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148 239

FORMER ADJUDICATION.—*Grounds of Defence.*—A matter finally determined by a competent tribunal is considered forever at rest, and the adjudication includes every ground of defence which might have been litigated in the case.

SAME.—*Promissory Note.—Answer of Fraudulent Alteration.—Reply.*—Where in an action upon a promissory note the maker answers a fraudulent alteration by the plaintiff, as adjudicated in a former action thereon, a reply that the alteration, if made at all, was made by the plaintiff's collecting agent without her fault, knowledge, connivance or consent, is bad.

SAME.—*Alteration.—Spoliation.*—The alteration of a note by the payee, whereby it is made payable at a bank in this State, is material and avoids the note, but an alteration by a stranger, or by an agent not having authority, is a mere spoliation, which does not release the parties.

$960, the full amount of the principal and interest of said note; that he has since kept the tender good and brings said sum into court for the appellant.

A reply in denial was filed, a trial had and a verdict returned for the appellant. A new trial was granted, the cause again tried and a verdict returned for the appellees. A motion for a new trial by appellant was overruled, and final judgment was rendered upon the verdict.

The errors assigned are that the court erred in granting the appellees a new trial, and in refusing to grant the appellant a new trial.

The last assignment is not pressed and will not be further noticed.

The first assignment calls in question the ruling of the court in granting the appellees a new trial. Such rulings are rarely disturbed, and should not be unless the record shows that the ruling has resulted in manifest injustice to the complaining party. *Collingwood* v. *Indianapolis, etc., R. W. Co.*, 54 Ind. 15; *Leary* v. *Ebert*, 72 Ind. 418. This is not shown by this record.

The motion of appellees for a new trial embraced many causes, among others, newly discovered evidence, and the appellant, assuming that the new trial was granted for such cause, strenuously insists that the appellees had not used due diligence before the trial to discover such evidence. If the motion embraced no other cause, there would be much plausibility in this position. But it was also insisted that the verdict was not sustained by sufficient evidence; that it was contrary to law; that the amount assessed was too large, and that the court erred in each of the charges given to the jury. It does not appear for what cause the new trial was granted, and it is clear that if it was granted for any cause other than for newly discovered evidence, there is nothing in appellant's position. The instructions are not in the record, and in their absence we can not say that a new trial was not properly granted, because some or all of them were erroneous. Again, if the new

trial was granted upon the weight of the evidence, we can not say that the court erred, as it does not appear that the preponderance was not clearly with the appellees. In a word, it does not appear that the court erred in granting a new trial, and, therefore, the judgment must be affirmed. *Comstock* v. *Whitworth*, 75 Ind. 129.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at appellant's costs.

No. 8309.

HEAVILON ET AL. *v.* FARMERS BANK OF FRANKFORT.

LANDLORD AND TENANT.—Where the term of a tenancy is uncertain, the tenant who sows a crop is entitled to reap it.

SHERIFF'S SALE.—*Real Estate.—Growing Crops.—Landlord and Tenant.—Judgment Lien.—Mortgage Lien.*—A tenant who sows crops on land subject to a judgment lien may claim them against a purchaser at a subsequent sheriff's sale, and this rule applies to land under the lien of a mortgage which creates no estate in the mortgagee. *Jones* v. *Thomas*, 8 Blackf. 428, distinguished.

SAME.—*Landlord's Share of Crops of Land Sold on Execution.—Redemption.*—The purchaser at sheriff's sale on foreclosure or upon execution gets only the landlord's share, at most, in the crops upon the land, when he obtains title; otherwise, if the crops were planted after the sale and during the year for redemption.

RECEIVER.—*Application for Appointment of.—Pleading.*—A petition for the appointment of a receiver must show affirmatively the facts which make the receiver necessary. It will not be sufficient to allege ignorance of material facts nor to allege a legal conclusion without stating the facts on which it is predicated.

SAME.—*Real Estate, Action to Recover.—Averments of Title in Petition for Receiver.*—Where, in an action for the recovery of real estate, a petition by the plaintiff for the appointment of a receiver is filed, averring the plaintiff's ownership of a junior judgment and his redemption from the foreclosure sale made by the defendant, the allegation of title that the "plaintiff afterwards took such other steps as required by law, as that,

on," etc., "and after due and legal sheriff's sale of said real estate," a deed therefor was by the sheriff executed to him, is insufficient.

From the Clinton Circuit Court.

L. McClurg, J. V. Kent, S. H. Doyal, P. W. Gard and *T. H. Palmer*, for appellants.

J. Claybaugh and *B. K. Higinbotham*, for appellee.

WOODS, J.—During the pendency of an action by the appellee against the appellants for the recovery of the possession of real estate, the appellee obtained the appointment of a receiver to take possession of the property and of the corn and wheat growing or standing thereon. From this order the defendants within ten days perfected an appeal, and now insist that the court erred in overruling their demurrer to the application for the appointment, and in sustaining a demurrer to their answer thereto.

We give the substance of so much of the petition and answer as is necessary to an understanding of the questions discussed in the briefs of the respective parties:

The petition, after stating the pendency of the principal action, and that the defendants hold possession of the real estate, which is described, and wrongfully and unlawfully keep the plaintiff out, proceeds to allege that on the 22d day of June, 1878, the defendant Amos Heavilon recovered in the Clinton Circuit Court a judgment against Enos Harshman and a decree against said Enos and his wife and others for the foreclosure of a mortgage on said real estate, upon which judgment and decree the property was duly sold by the sheriff of the county, on the 10th day of August, 1878, to said Heavilon, for the full amount of his decree and costs; that on the 9th day of August, 1879, the plaintiff, being the owner of a judgment against the said Enos Harshman, which was due and unpaid, and being thereby entitled to redeem said real estate from the sale aforesaid, did redeem the same by paying to the clerk of said court, for the use of said purchaser, the amount of his purchase-money with ten per cent. interest

thereon from the date of the sale, which money the said Heavilon received of the clerk, as and for the purposes paid, "and plaintiff afterwards took such other steps as required by law; that on the 19th day of September, 1879, and after due and legal sheriff's sale of said real estate, the sheriff of Clinton county, Indiana, executed a deed to the plaintiff for said real estate, and plaintiff says that by reason of the premises she became entitled to the possession of the property on said day; that the owner of the judgment, by virtue of which she made said redemption as aforesaid, was a party defendant to the foreclosure suit; that there is a large amount of corn on said real estate, and a large amount of growing wheat upon said real estate, which corn was planted and which wheat was sowed thereon in the spring and summer of 1879, during said redemption year, the wheat being sown since the redemption year expired; that the plaintiff never gave consent to any person to plant the corn or sow the wheat; that said corn and wheat are the property of the plaintiff by reason of the premises hereinbefore set forth; that said corn crop is now about ripe and ready to gather, and in all probability the wheat crop will be ready to reap before the determination of this suit; that the defendants are in possession of the said real estate as trespassers and wrongdoers thereupon, claiming the right to gather the corn for their own use, and, since the commencement of the said action of ejectment, have been gathering, selling and converting the same to their own use and threaten to continue so to do, and also claim the right and threaten to reap said wheat, when the same shall become ripe, for their own use, denying the plaintiff any right therein or to any part thereof; that, excepting said Heavilon, the defendants are wholly insolvent, and if permitted to gather and sell or convert said crops to their use, the plaintiff will be without remedy against them; that said Heavilon claims to be entitled to some portion of the crops as rents coming from the other defendants, but what portion and upon what arrangement, contract or relation between them, the plaintiff

is not informed; that said lands are valuable farming lands, whereon large quantities of hay-making grasses grow annually, upon which the defendants have been and threaten to continue pasturing their cattle and horses, thereby using and destroying the same."

The answer of the defendants to this petition is, in substance, that pending the action of Heavilon to foreclose his mortgage on the 20th of June, 1878, said Heavilon and one Samuel Ayres entered into a written contract, a copy of which is set out, whereby Heavilon contracted for the purchase of the legal title of said lands of Harshman, the owner; that on the 21st day of June, 1878, Heavilon obtained a decree of foreclosure of his mortgage, and by virtue of that decree became, on the 10th day of August, 1878, the purchaser of all of said lands, bidding therefor the full amount of his decree, to wit, $11,816.38, and that on said day, pursuant to said contract, Harshman delivered to said Heavilon possession of all of said lands; that in April, 1879, Heavilon, as owner in possession, rented the lands to the other defendants, for the purpose of raising a corn crop thereon during the season of 1879; that said tenants did cultivate the land, producing the corn which is now upon the land; that the wheat growing on the land was sown by such tenants, with the consent of Heavilon, after the redemption by the plaintiff from the sale on the decree of foreclosure, but before the sheriff's sale upon the plaintiff's execution; that on the 9th of August, 1879, the plaintiff, being the owner of a junior judgment lien, redeemed from Heavilon's mortgage sale, and then had the lands sold upon an execution issued upon said judgment, and, bidding them in, thus obtained title on the 19th day of September, 1879, having then, and at the time of said redemption, full knowledge of the rights and possession of each of the defendants; that the defendants are willing to attorn to the plaintiff.

The discussion of counsel is confined mainly to the right of property in the corn and wheat upon the land on the 19th day

of September, when the appellee claims to have become the owner of the land.

The general principle seems to be recognized, "that the tenant who sows a crop shall reap it, if the term of his tenancy is uncertain, * * yet if a mortgagee forecloses his mortgage, whatever crops are then growing upon the mortgaged premises, if planted after the mortgage is made, become the mortgagee's, whether planted by the mortgagor or by his tenant, free from any claim upon them by such tenant." 1 Washburn Real Prop. 106, section 21, citing, among other cases, *Jones* v. *Thomas*, 8 Blackf. 428. "The foregoing doctrine, in respect to the rights of a mortgagee," says the same author, in the next section, "would probably be limited to cases where a mortgage creates an estate in the land. But in the case of a judgment lien, a different rule prevails. A tenant who hires land subject to such a lien, and plants crops upon the same before a sale of the premises made, may claim them against a purchaser under sheriff's sale." *Bittinger* v. *Baker*, 29 Pa. St. 66.

When *Jones* v. *Thomas*, *supra*, was decided, it was the established doctrine here, as elsewhere, that a mortgage transferred the title to the mortgagee, and, after condition broken, if not before, enabled him to maintain ejectment, and this led, inevitably, to the conclusion declared in that case. The rule, now well established, however, is, that a mortgage creates no estate in the mortgagee, but confers on him only a lien upon the estate of the mortgagor, which estate, by force of the mortgage, can be transferred to the mortgagee only by a foreclosure and sale according to law. When such foreclosure and sale can or will be accomplished in any case, can not be anticipated, and so the term of tenancy being uncertain, the case comes under the general rule already stated; besides the statute of redemption now prolongs the right of possession of the land-owner or occupant beyond the time of sale, whether upon execution or decree, for the period of one year. When that

year will terminate, can not be known, of course, until the sale has been made, or, at least, advertised.

After a sale has been made, or perhaps advertised, it would seem that, as against the purchaser, the tenant who would sow must do it at his peril.

Applied to the case in hand, these principles offered a plain solution. Heavilon had foreclosed his mortgage, and, under his contract with Harshman, the mortgagor, for the purchase of his right to redeem, he had possession of the property, and to all intents and purposes was the owner thereof, subject only to the right of the appellee, as owner of a junior judgment lien, to redeem from his foreclosure sale. Whether the appellee would redeem, and if so, when a resale of the property would be effected, and how it would be effected, were matters of conjecture and uncertainty. The policy of the law is to encourage husbandry, "by assuring the fruits of his labor to the one who cultivates the soil." 1 Washb. Real Prop. 102; 2 Black. Com. 122. Heavilon, therefore, was entitled himself to put out annual crops, or to lease the land to others for that purpose, and when the appellee did, if at all, become the owner of the fee, the utmost interest acquired in the crops was the landlord's share, and for this interest it is not made to appear that the landlord's lien, under the proposed attornment, was not ample protection. 2 R. S. 1876, p. 342, section 17; R. S. 1881, section 5224. See *Bowen* v. *Roach*, 78 Ind. 361.

There are, besides, special objections to the petition for the appointment of a receiver, which seem to us to be material. It is not shown but that the plaintiff had a complete remedy at law against Heavilon, whose solvency is not disputed, for all apprehended injuries. It is inferable from the complaint that the other defendants were in under him, and, as against the pleader, it may be presumed that he was responsible for their acts. A receiver should not be appointed upon allegations of the petitioner's ignorance of material facts, but only upon an affirmative showing of the necessity therefor.

The complaint also fails to show that the plaintiff had acquired title to the land. The allegations, in this respect, amount to no more than the statement of a legal conclusion, while, by the rule of pleading, the facts should have been shown, on which the conclusion is predicated. It was enough in the complaint in ejectment for the plaintiff to have alleged generally that he was the owner and entitled to the possession; the statute makes that sufficient; but when, in his petition for the appointment of a receiver, he undertook to show the origin of his title, and had stated the ownership of a junior judgment and the redemption made from the foreclosure sale, it was not enough then to allege, "and the plaintiff afterwards took such other steps as required by law," etc. He should have stated the particular steps whereby he obtained an immediate conveyance by the sheriff which should invest the title in him instantly and without further right of redemption. The act of March 31st, 1879, concerning the redemption of real estate sold upon execution or decree, had come into force, and various steps are thereby required to be taken by the judgment creditor, who has redeemed from a prior sale, in order to obtain the right to resell on his judgment, so as to cut off the right of further redemption. Besides, the general rule is, that one who claims by a sheriff's sale must show a judgment, and execution thereon, a levy and sale according to law; and, unless there is a special rule to the contrary, the necessary facts to support the conclusion must be averred, and not the conclusion alone.

The demurrer to the petition should have been sustained, and that to the answer should have been overruled.

Judgment reversed, with costs.

On Petition for a Rehearing.

Woods, J.—The counsel for the appellee now insist, in substance, that Heavilon did not perform his agreement with Harshman, under which he obtained possession, and, therefore, was not, to all intents and purposes, the owner, and em-

powered to lease or sublet to his co-defendants; that they must be regarded as holding possession under Harshman, who could have no right to crops which had been put out after the sheriff's sale, unless he redeemed, and who, if he had put them out, must have done it at his peril.

Conceding the fact on which this argument is built, the conclusion which we reached is not affected. Heavilon was the purchaser at the sale which had been made, and whether he performed his agreement with Harshman, is a question which is not material to the discussion. If Heavilon was not the owner, Harshman was; between the two, at least, there was a complete ownership and right of disposition, subject only to the right of the appellee to redeem from that sale, and to subject the property to a second sale, from which there could be no redemption after a year from the first sale; but, when the crops were put out, the second sale, so far as appears, had not been ordered or advertised, and it being uncertain, when, if ever, the resale would be made, the condition existed which assures to the sower the right to reap.

The argument of counsel is also directed against other points of the decision, but on these we do not care to add to what is said in the original opinion.

Petition overruled, with costs.

No. 9648.

McAllister v. State, ex rel. Heath et al.

Appeal.—*Parties.*—*Execution.*—In an appeal to the Supreme Court by A. from a judgment refusing to quash an execution against A. and B., on the motion of A., it is not necessary to make B. a party.

Same.—*Time.*—An appeal from a judgment overruling a motion to quash an execution may be taken, and is in time if taken within a year from the time of overruling the motion; and in such case the record is conclusive as to the time, and can not be contradicted by answer to the assignment of errors.

McAllister *v.* State, *ex rel.* Heath *et al.*

REPLEVIN BAIL.—*Defects Cured.*—*Bastardy.*—Following a judgment in the usual form against the defendant in bastardy, there was a recognizance of replevin bail, not attested or approved by the clerk, but in the form prescribed by statute, save that the word "security" was used instead of "bail."

Held, that it was made good by section 1221, R. S. 1881, and applied to the judgment in gross.

From the Ohio Circuit Court.

J. B. Coles, for appellant.

J. S. Jelley and *S. R. Downey*, for appellees.

ELLIOTT, C. J.—The appellant filed a motion to quash an execution issued against him and one Edward McAllister.

Appellee has moved to dismiss the appeal, and the questions presented by this motion first require consideration. The ground upon which it is rested is, that Edward McAllister is not made an appellee, and was not notified of the appeal. It was not necessary that he should have been made a party to the appeal. The motion was by the appellant alone; the judgment pronounced upon it was against him solely, and Edward McAllister was in no wise affected by the motion or judgment.

Answers to the assignment of errors have been filed, presenting, or rather attempting to present, the question of the time within which the appeal was taken. The theory of the answers is, that the judgment in the original case is the one appealed from. The theory rests upon an undue assumption. The appeal is not from the original judgment, but from the judgment overruling the motion to quash the execution. The record shows that the appeal was taken within one year from the time the judgment upon the motion was pronounced, and this is sufficient.

The record is conclusive as to the time the judgment was rendered, as well as to its character, and the appellee can not, by an answer to the assignment of errors, contradict the statements of the record. If the record is not correctly cer-

tified, the remedy is by *certiorari*. If the record was incorrectly made up, the remedy is by a proceeding in the trial court to secure the proper correction.

An appeal will lie from a judgment upon a motion to quash an execution. A judgment upon the final hearing of such a motion is a final judgment, within the meaning of the statute. It is so expressly adjudged in *Wright* v. *Rogers*, 26 Ind. 218.

Edward McAllister was prosecuted upon a charge of bastardy, and a judgment rendered against him. The appellant signed the following acknowledgment: "I, Daniel McAllister, acknowledge myself security for the payment of the above sums of money and costs, and accruing costs as stated above." This acknowledgment appears to have been made and entered immediately after the judgment upon the order book of the court.

The contention of counsel is, that this is a mere contract of suretyship, and not an entry of replevin bail, and no execution can issue upon it. We are not inclined to adopt this view. The decree of the court directed that Edward McAllister should be taken into custody unless he replevied the judgment; the acknowledgment, signed by the appellant, immediately follows this order, and it secured the principal's release. The language of the record entry conforms very nearly to that prescribed by the statute. Indeed, the chief difference is, that the entry uses the word "security" instead of the word "bail." We are satisfied that the case comes fully within the provisions of section 790 of the code of 1852, 2 R. S. 1876, p. 311.

Cases decided prior to the enactment of the statute referred to can not be allotted a controlling influence, for to do so would be to seriously impair, if not to altogether destroy its beneficial operation. The case of *Sterne* v. *McKinney*, 79 Ind. 578, does not support appellant's argument. In that case the attempt was to replevy one-half only of an entire judgment, and it was held that the statute does not authorize the re-

plevying of a part of an entire judgment. There the defect was as to the substance, and of such a material character as to carry the entire undertaking without the statute; here the defect is one of mere form. The legal effect of the undertaking is not affected in any important respect by the use of the word "security." The term is inaccurately used, but there can be no doubt as to the real meaning of the undertaking. In *Hawes* v. *Pritchard*, 71 Ind. 166, bail was entered for a period of one hundred and eighty days, when it should have been entered for one hundred and fifty days, and it was held to have the effect of a judgment confessed, the court saying: "The effect of these provisions of section 790 of the code, upon informal or defective bonds, recognizances or written undertakings, taken by an officer in the discharge of the duties of his office, has of late been the subject of full consideration by this court, in a number of cases; and it has been uniformly held, as we now hold, that the effect of these statutory provisions is to legalize and validate the bond, recognizance or written undertaking in question, and make of it just such an instrument as was contemplated and called for by the terms of the statute, under which it appears to have been executed."

The statute does not require a formal approval of the recognizance of replevin bail. *Ensley* v. *McCorkle*, 74 Ind. 240. But if it were conceded that the statute does require such an approval, its omission would not invalidate the undertaking. It is now well settled that the omission of the formal endorsement of approval or of attestation of the entry of bail will not have the effect to destroy its character as a "judgment confessed." *The State, ex rel.*, v. *Trout*, 75 Ind. 563; *Stone* v. *The State, ex rel.*, 75 Ind. 235.

It is said that the appellant was bound only to the extent of the instalment due at the time the judgment was replevied, and we are referred to *Skelton* v. *Ward*, 51 Ind. 46. That case is not in point. The judgment in the present case is for the gross sum of five hundred dollars, and it was the

judgment which the statute required the defendant to replevy, and this judgment it was that he did replevy. 2 R. S. 1876, p. 659. It is true the judgment is payable in instalments, but it was not one instalment for which bail was entered, but the entire judgment.

Judgment affirmed.

No. 9191.

Ansley v. Meikle et al.

New Trial.—*Evidence Offered.—Exception.*—An exception to the ruling of the court in allowing a party to "offer" certain evidence, is meant to include the putting in of the evidence.

Evidence.—*Foreign Statutes. Authentication.*—A statute of another State, authenticated as required by the act of Congress, R. S. 1881, section 454, is admissible in evidence, though the authentication be not in conformity with the statute of this State, R. S. 1881, section 457.

From the Madison Circuit Court.

H. C. Ryan, for appellant.

J. W. Sansberry and *M. A. Chipman*, for appellees.

Morris, C.—The appellant sued the appellees upon the following note:

"$200. Indiana, Pa., 10 Aug., 1878.

"Six months after date I promise to pay to the order of Jas. Meikle, at the First National Bank of Indiana, two hundred dollars, without defalcation or stay of execution. Value received. Wm. Meikle."

It is averred in the complaint, that the payee of the note, by indorsement thereon, assigned it to the First National Bank of Indiana, Pennsylvania, and that the appellant indorsed his name on the back of said note, as the surety of the said William and James Meikle; that the appellees having failed to pay said note at maturity, the appellant was compelled to and did pay the same to said bank; that by such payment he be-

came subrogated to all the rights of the bank in and to said note, and has a right to maintain an action upon the same against the appellees. He demands judgment for the amount of the note and interest.

The appellees answered by a general denial. They also answered that the appellant was not the owner of the note, but that the same belonged to the First National Bank of Indiana, Pennsylvania. The appellees set up in a third paragraph, that the note in suit was given for usurious interest, claimed by the First National Bank of Indiana from the maker, and that it was therefore void and without consideration. It was averred in the answer that the note was executed in the State of Pennsylvania; that the only consideration was illegal and usurious interest claimed to be due said bank for money formerly loaned by the bank to the maker of the note. Copies of several acts of the General Assembly of Pennsylvania on the subject of usury were filed with the answer.

The appellant replied in denial of the answer.

The cause was submitted to a jury for trial, who returned a verdict for the appellant for $25.90.

The appellant filed a motion for a new trial, which was overruled, and he excepted, and final judgment was rendered upon the verdict.

A bill of exceptions, containing the statutes of Pennsylvania put in evidence on the trial by the appellees, and the authentication of the same, is in the record. It does not contain all the evidence given in the case.

One of the reasons stated in the appellant's motion for a new trial, and the only one we need to notice, is as follows:

"8. The court erred at the trial of the cause, in permitting the defendants in said cause to *offer* in evidence, over the objection of the plaintiff, a certified copy of the statutes of Pennsylvania."

The appellees insist that the mere offering of the statutes of Pennsylvania in evidence was no ground for a new trial, and that the motion, as to this alleged cause, was properly

overruled. We think, however, that the word "offer" as used was equivalent to the word "read," and that it must have been understood in that sense by the court and the appellees.

The appellant insists that the court erred in admitting the statutes of Pennsylvania to be read in evidence, because they were not duly authenticated. There is a certificate of the Secretary of State of the State of Pennsylvania attached to the copy of the statutes read in evidence, in these words:

"Office of the Secretary of the Commonwealth, Harrisburgh, March 10, A. D. 1880, Pennsylvania, ss:

"I do hereby certify that the foregoing and annexed is a a full, true and correct copy of the two original acts of the General Assembly of this Commonwealth, entitled 'An act regulating the rate of interest,' and 'An act extending the provisions of an act entitled "An act regulating the rate of interest," approved May 28, one thousand, eight hundred and fifty-eight, to all corporations authorized to loan money within this Commonwealth, and repealing all laws inconsistent with the provisions of said act,' as the same remains on file in this office.

"In testimony whereof, I have hereto set my hand and caused the great seal of the State to be affixed, the day and year above written.

[Seal.] "M. S. TUAY,

"Secretary of the Commonwealth."

The certificate of the Governor of the State is also attached, under the seal of the State, in which he certifies that the certificate of the Secretary of State is in due form, and made by the proper officer; that the said M. S. Tuay was, at the date of said certificate, the Secretary of the Commonwealth of Pennsylvania, and that full faith and credit is due to his official acts.

The appellant insists that the certificate does not conform to section 278 of the code, 2 R. S. 1876, p. 148. In this, we think the appellant is right. The copies of the statutes

of Pennsylvania read in evidence do not purport to have been taken from the printed statute books of the State. The copies, as appears from the Secretary's certificate, were made from the originals on file in his office, and were certified under the seal of the State.

Section 278 of the code refers only to copies made from the printed statute books of the several States. The mode of proving the statute law of another State, prescribed by the code, should not be construed or held to exclude other legal modes of proving such statutes. *Miller* v. *The State, ex rel.*, 61 Ind. 503, 510. In this case it was held that section 280 of the practice act, providing that a copy of the proceedings and judgment of any justice of the peace of this State, certified under his hand and seal, as true and complete, etc., shall be received as evidence in the courts of this State, did not exclude the original itself as evidence. So, too, it has always been held that the act of Congress, which provides that the acts of the Legislatures of the several States shall be authenticated by having the great seal of their respective States affixed thereto, is not exclusive of any other method of proof which the States may adopt. 1 Greenl. Ev., section 489; *Lothrop* v. *Blake*, 3 Barr, 483. Nor was the 278th section of the code intended to be exclusive of the method of proving the legislative act of other States, prescribed by the 9th section of the acts of Congress of May 26th, 1790. 2 R. S. 1876, p. 150. Nor, if so intended, could it have that effect. It might be important to prove, in the courts of this State, the existence of a statute in another State, immediately upon its enactment, and before it might be printed in any book. Yet, if the 278th section is to be held to be the exclusive and only method of proof, the existence of such a statute could not be established.

As the statutes of the State of Pennsylvania, read in evidence in this case, appear to have been authenticated in accordance with the act of Congress upon the subject, there was no error in their admission as evidence.

As this is the only question pressed in argument by the appellant, no other question will be noticed. The judgment of the court below should be affirmed.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

No. 9306.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY v. SCHMIDT.

NEGLIGENCE.—*Railroad.*—*Complaint.*—A complaint which avers that the servants and employees of a railroad company, while the plaintiff's horse was upon a highway near a railroad crossing, stopped the engine at the crossing and negligently caused the steam to escape, making a great noise, after having been requested not to do so, whereby the horse became frightened, reared up and fell backwards, killing himself, shows that the injury was the "natural and proximate" result of the negligence.

SAME.—*Contributory Negligence.*—A party, who is himself guilty of contributory negligence, can not recover for injury to himself or property.

SAME.—*Railroad Crossing Street.*—*Killing Horse.*—A party who drives a horse toward a railroad crossing upon or near which an engine is standing, and, notwithstanding the fact that the horse is frightened at the engine, thereafter leads him toward the crossing, until a narrower point in the street is reached, where it is difficult to turn him, and the horse becomes so frightened as to be unmanageable, and then rears and falls backward and kills himself, is guilty of contributory negligence, and can not maintain an action against the railroad company for such injury.

From the Vanderburgh Circuit Court.

S. B. Vance, for appellant.
C. F. Gould, for appellee.

BEST, C.—This action originated before a justice of the peace, and upon an appeal to the superior court the appellee filed an amended complaint in these words:

"The plaintiff complains of the defendant, and says, that defendant was, upon the 29th day of July, 1880, a corporation owning a railway, running into the city of Evansville, Pigeon township, Vanderburgh county, State of Indiana; that, upon said last mentioned date, said defendant, by its servants, drove and conducted a locomotive engine upon said railroad in said township, county and State; that the horse of this plaintiff was, by the agent of this plaintiff, being driven to said railroad, at said time, upon a public road, for the purpose of lawfully crossing the said railroad, when the defendant, in the course of its business and by its servants, so negligently drove and conducted the said engine, and allowed steam to escape from unusual parts thereof, and made a great noise, causing said horse to become frightened, although often requested not so to do; that the servants of said defendant stopped said engine close to said horse, by which said horse was frightened, and then and there, whilst said horse was in great danger of causing great injury to itself and other property and persons, by reason of said fright, caused as aforesaid, said defendant, by its servants, in the due course of its business, though often requested not so to do, negligently and carelessly caused said steam to escape from said engine, while said engine stood in close proximity to said horse, and made a loud noise, which said servants of said defendant might well have avoided, whereby said horse reared up and fell, breaking his neck and dying on the spot.

"Plaintiff further says, that said death of said horse, and the fright which caused the same, were not caused in any manner by the fault or negligence of this plaintiff or his agents, but that every care was taken by the said plaintiff to prevent said injury, and the same was caused by the negligent and careless acts of the servants of the defendants, as aforesaid, whilst they were in the employ of the said defendant, and in the due course of their employment. Plaintiff further says that said horse was reasonably worth $100. * * * Wherefore," etc.

A demurrer for want of facts was overruled to the complaint; the issues were tried by a jury, and a verdict returned for the appellee. A motion for a new trial was overruled, and final judgment entered upon the verdict.

The errors assigned are that the court erred in overruling the demurrer to the complaint, and in overruling the motion for a new trial.

The only objection urged to the complaint is, that the injury alleged is not the "natural and proximate" result of the negligence averred. We think otherwise. *The Indianapolis, etc., R. W. Co.* v. *McBrown*, 46 Ind. 229.

The complaint is not bad for the reason named, and, therefore, the first assignment can not be sustained.

The reasons embraced in the motion for a new trial are, that the verdict is not sustained by sufficient evidence, and is contrary to law.

An examination of the evidence leads us to the conclusion that this motion should have been sustained.

Seventh Avenue, in the city of Evansville, is a street thirty feet in width, which crosses several tracks of the appellant's road, near or within its yards. The employees of appellant were making up a train of cars, and had backed across Seventh Avenue, stopping the engine near the crossing. While it stood in this position, the servant of the appellee approached, upon Seventh Avenue, the crossing, driving a butcher's wagon, to which the horse was hitched, and while the engine remained stationary the injury occurred. It is thus described by the witnesses. Jacob Schneider, the boy who was driving the horse, testified as follows:

"I was in the employment of the plaintiff in the month of July last; on some day, in the latter part of said month, was driving his horse to a butcher's wagon, along Seventh Avenue, in the city of Evansville, going to Reitz's saw-mill for a load of sawdust. I was driving him towards the railroad track, for the purpose of crossing it. There was an engine standing on the railroad track, about half way across the street on which I

was driving; as I approached the track, the horse became frightened so that I could not manage him; there is a deep gully on each side of Seventh Avenue, at the place the railroad crosses it, which was filled with water at the time of the accident; he was frightened at the engine, from the cylinder of which steam was escaping; there was a man on the engine; my father ran up and caught the horse, and hallooed to the man on the engine, 'For God's sake, stop that steam!' he did not stop the steam, but it continued to escape; the man did nothing but stand and look at us and laugh; the horse reared up two or three times, fell back and broke his neck; I had been driving the horse five or six months; I believe the horse could have been safely led across the railroad, if the steam had been stopped."

On cross-examination, the said witness testified as follows: "The engine was on the track in Seventh Avenue where it crosses the railroad track, and was about half way across it; I do not know whether the valves were open, but steam was escaping from the cylinder; the horse became frightened at the engine when he was thirty yards from it, so that I could not manage him; I could not turn him around, because he was so scared, and the street was so narrow; I was afraid the horse might fall into the deep gully at the sides of the street; the street was thirty feet wide, and the horse was hitched to a butcher's wagon, and deep holes, with water in them, were on each side of the street; he was so frightened that I could not take him out of the wagon; I drove him on, nearer to the engine, because I could not hold him; the horse first became alarmed about the middle of Schaum's malt house; another boy, named Charley Kruger, was with me in the wagon; I did not blindfold him then; I had a handkerchief in the hand with which I was leading him, but did not put it over his eyes; where the horse was killed there was a deep hole on each side of the street; my father unhitched the horse from the wagon and tried to lead him across the railroad track."

The next witness was Charley Kruger, who testified as follows:

"I was with Jacob Schneider when the horse of Mr. Schmidt was killed near Schaum's malt house, in July last. I had been riding in the wagon with him, until the horse got scared, when we got out of the wagon. The horse got scared at the engine. It was standing on the corner of Seventh Avenue and the railroad street, and the steam was coming out of it. Mr. Schneider took hold of the horse and told the man on the engine, 'For God's sake, stop that steam!' Mr. Schneider took the horse out of the wagon, and he reared up and fell back, and broke his neck. The steam kept coming out of the engine all the time."

On cross-examination, he testified as follows:

"When the horse first got scared he was pretty near at the middle of Schaum's malt house. I saw the engine then. The boy had to get out and lead and hold him."

The next witness was Valentine Schneider, who testified as follows:

"I am the father of the boy, Jacob Schneider, who has testified for the plaintiff in this case. I knew the horse of Anton C. Schmidt, that was killed last July, on Seventh Avenue, in the city of Evansville, and near the railroad track. I had left my son about fifteen minutes before the accident occurred, and had gone into a saloon. When I came out of the saloon I saw the horse; he was near the railroad track, and was very much frightened. An engine was standing on the railroad track, near the crossing, and steam was escaping from it. The boy was unable to manage the horse. I caught hold of the horse and hallooed to the man on the engine, 'For God's sake, stop that steam!' He did not stop the escape of the steam. He stood still, and looked at us. The horse reared up, pitched me around, and threw me down, and fell back on the wheel of the wagon, and broke his neck. If the steam had not been escaping from the engine, I think he could have been led across the railroad track."

On cross-examination, he said:

"I did not try to lead the horse away from the engine, because he was too scared; he did not give me time. As soon as I got him loose from the wagon, he began to rear up, and threw me around, and then fell back and broke his neck. He was about as far from the railroad track as from here to the bench in front of that man yonder, about thirty feet. He was not much further than that from the engine."

Wm. Jonini testified as follows:

"I saw the horse of the plaintiff, when he was killed; was about seventy-five yards from him; saw steam escaping from the cylinders of the engine."

The foregoing was all the testimony of the plaintiff relative to the horse's death.

The appellant produced a couple of witnesses who testified as to the place where the horse became frightened, and its distance from the crossing. Lewis Geiger testified:

"I was at work in Schaum's malt house on the day the plaintiff's horse was killed. I saw the horse in front of the malt house; he was in charge of two boys, of whom Charley Kruger was one. I did not know the other boy. The horse seemed to be frightened at the railroad, or something in that direction. The boys got out of the wagon, * * * * and started, leading him towards the railroad. When in front of the malt house he was one hundred and fifty or one hundred and ninety feet from the railroad."

Henry Bruner testified:

"I saw him in charge of Jacob Schneider and Charlie Kruger, when in front of the malt house. He was frightened at the railroad, and the boys * * * * led him towards the road."

The engineer testified, that they were making up a train of cars; that he was looking back for a signal from the brakeman to go forward, and that when he received it he turned, reversed his engine, and at that instant saw the horse and man, and heard the man call to him, as he understood him,

"to stop that machine;" that he did not start the engine until after the horse had killed himself, and that no more steam was escaping than was usual.

Conceding that the engine was standing so near the crossing as to amount to a practical obstruction of the street, the question remains whether the servant of the appellee was not guilty of negligence in attempting to take the horse across the track in front of the engine after the horse had become frightened. The undisputed facts are, that when the horse was driven to the malt house, distant from the crossing at least one hundred and fifty feet, he became so frightened at the engine in front of him that the boy who was driving him got out of the wagon and attempted to lead him toward the crossing. He succeeded in leading him from one-half to two-thirds of the distance, when he became so frightened as to be unmanageable, and then the boy's father caught the horse, unloosed him from the wagon, and immediately thereafter the horse reared, fell back and killed himself. At this time he was near the engine, and the parties having the horse in charge were attempting to take him across the track. This they suppose could have been successfully done had the steam not been allowed to escape. These acts clearly constitute contributory negligence upon the part of the appellee. The boy in charge of the horse was bound to use ordinary care and diligence in taking him across the track, so as to avoid injury. Ordinary care is that degree of care that a person of ordinary prudence will use, so as to avoid injury under the particular circumstances of the case. It is well settled that a recovery can not be sustained when the injury could have been avoided by the exercise of ordinary care and prudence. *The Toledo, etc., R. W. Co.* v. *Goddard*, 25 Ind. 185, and authorities cited.

When the horse at the malt house first became frightened, it was the duty of the boy in charge of him to have stopped and waited until the engine had moved away, so that the horse could have been safely driven across the track, or to have

turned and avoided the danger to which the engine exposed him. At this time the boy could have controlled the horse, and could easily have avoided the danger; but instead of doing this, with the engine in full view, and with full notice that the horse was then frightened by it, he led the horse toward it until he reached a part of the street where it was difficult, if not impossible, to turn, and until the horse, in his fright, reared, fell, and killed himself. These acts upon the part of the appellee's servant amount to an assumption of the risk in attempting to lead the horse over the crossing, and the appellee must himself bear the loss. *Bruker* v. *Town of Covington*, 69 Ind. 33, and authorities cited.

This conclusion renders it unnecessary to determine whether the evidence shows negligence upon the part of appellant.

For these reasons, we think the court erred in refusing to grant a new trial, and that the judgment should be reversed.

Per Curiam.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things reversed, at the appellee's costs.

No. 9116.

Du Pont et al. v. Beck.

Pleading.—*Promissory Note.—Consideration.—Irrelevant Averments.—Demurrer.* A promissory note imports a consideration, and consequently averments in a complaint on such note, concerning the origin and nature of the consideration, are irrelevant and not to be considered on demurrer.

Same.—*Anticipation of Defence.*—It is not proper, in anticipation of the defence, to aver in the complaint matters which do not aid the statement of the cause of action.

Bankruptcy.—*Fiduciary Debt.—Discharge.—Factor or Commission Merchant.*—The obligation of a factor or commission merchant to his principal for the proceeds of goods sold is not, under the bankruptcy law of 1867, a fiduciary debt, and is, therefore, discharged by a discharge in bankruptcy.

From the Marion Circuit Court.

P. W. Bartholomew, for appellants.

A. T. Beck and *J. A. Buchanan*, for appellees.

WOODS, J.—The appellants sued the appellees upon a promissory note, alleging that the plaintiffs had consigned goods to the defendants to sell for the plaintiffs, the proceeds of sales to be held by the defendants in trust for and to be paid over to the plaintiffs, less the commission due the defendants for selling; and that on the 23d day of April, 1878, the defendants had in their hands, belonging to the plaintiffs, $2,898, which they had unlawfully and fraudulently converted to their own use, and upon demand refused to pay plaintiffs; and, as an evidence of the indebtedness, executed to the plaintiffs their promissory note, a copy of which is filed with the complaint, etc.

According to the copy given, the note was payable one day after date, to the order of the plaintiffs at Fletcher's Bank, Indianapolis, Indiana.

Contemporaneously with the making of the note, the parties entered into an agreement which is also made an exhibit with the complaint, whereby it was stipulated that the note might be paid in specified instalments, and that the payees should not commence suit on the note so long as the instalments were promptly paid, unless the makers should become insolvent so as to endanger the rights of the payees in any way, in which case they might take such course as would best secure their claim.

This agreement by its terms purports to be upon or annexed to the note.

The defendants each answered a discharge in bankruptcy by the District Court of the United States for the District of Indiana, their discharges bearing date July 9th, 1878.

The court having overruled their demurrers to these answers, the appellants excepted, and have assigned the ruling as error here.

The question discussed by counsel is, whether, upon the

facts stated in the complaint, the debt sued on is shown to be of such a character as to come within section 245 of the bankruptcy act of 1867, R. S. U. S. 1878, section 5117, which reads: "No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in a fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt."

The appellants contend that the debt in this instance is shown to have been created by the fraud of the bankrupts, and also while they were acting in a fiduciary character.

Disputing this, counsel for the appellees claim that if it were so the appellants, by taking and suing upon the note, have waived the right so to treat the indebtedness, putting themselves in the position of ordinary creditors, holding the debtor's promise to pay.

It is a familiar rule of practice and pleading, that a demurrer to an answer or reply searches the antecedent pleadings, and, also, that the demurrer admits what is well pleaded, and nothing more.

The ruling upon the demurrers to the answers, therefore, brings under consideration the allegations of the complaint only in so far as they were pertinent and essential to the statement of the cause of action sued on.

The cause of action in this case was the promissory note, which in itself imports a sufficient consideration. The allegations concerning the transactions out of which the consideration arose, and what the consideration was, are irrelevant and immaterial, put in evidently for the purpose of anticipating the defence, but unavailing for that purpose, because, by the rules of good pleading, they ought to be set up, if at all, in the reply, and when found in the complaint must be rejected as surplusage.

But, aside from this view of the pleadings, we are of opinion that the ruling of the court was right.

Under the law of 1841, it was held that the exception in reference to fiduciary obligations embraced technical or special trusts only, such as those of "executor," "administrator," "guardian" or "trustee," which were named in the act, and that a factor's liability to his principal was not included. *Chapman* v. *Forsythe*, 2 How. 202. The phraseology of the act of 1867, is in this respect somewhat different, and there has been some contrariety of opinion and of decision upon its interpretation; but the weight of authority and the better reason seem to be to the effect that the latter act is in substance and effect a re-enactment of the former in this particular, and, therefore, to be construed as including in the class of "fiduciary" debts technical trusts only, and not those implied by law from contracts of agency or bailment. See following cases, and cases cited therein: *Woodward* v. *Towne*, 127 Mass. 41 (S. C. 34 Am. R. 337); *Hennequin* v. *Clews*, 77 N. Y. 427 (S. C. 33 Am. R. 641); *Green* v. *Chilton*, 57 Miss. 598 (S. C. 34 Am. R. 483); *Woolsey* v. *Cade*, 54 Ala. 378 (S. C. 15 N. B. Reg. 238, and 25 Am. R. 711); *Curtis* v. *Waring*, 92 Pa. St. 104. See also *Desobry* v. *Tête*, 31 La. An. 809 (S. C. 33 Am. R. 232).

Judgment affirmed, with costs.

No. 8387.

31 274
130 312

Bole et al. v. Newberger.

Judgment.—*Mistake.*—*Error of Law.*—*Complaint.*—A complaint to correct a judgment for mistake, which does not show any mistake in the entry, but merely an error of law, is insufficient, and no relief can be granted thereon.

Same.—*Sheriff's Sale.*—*Foreclosure.*—*Bona Fide Purchaser.*—*Notice.*—The order of sale on foreclosure of a mortgage is the sheriff's authority to sell, and if he sell to the plaintiff for the whole debt (the order being to make only a part) more of the mortgaged property than is directed by

the order, the latter is not a *bona fide* purchaser without notice of the irregularity, but of such sale the defendant may be relieved, and on his prayer the court may confirm title in the plaintiff to so much of the property as was directed to be sold, and adjudge the rest to the defendant.

SAME.—*Reformation of Judgment of Foreclosure.*—Where, on complaint to foreclose a mortgage to secure several instalments, the judgment directed the sale of a part of the lands mortgaged to make the amount of the instalments then due—being silent as to the instalments not due—and the sheriff sells the *whole* of the lands to the plaintiff, the latter can not by complaint, without showing that the judgment entered was other than the court intended, obtain its reformation; and it is doubtful whether he can, by an original suit, have any relief.

From the Grant Circuit Court.

W. L. Lenfesley and *J. H. Compton*, for appellants.

A. Steele, R. T. St. John and *L. Newberger*, for appellee.

ELLIOTT, C. J.—The material facts stated in the complaint of the appellee, who was the plaintiff below, are these: At the September term, 1877, of the Grant Circuit Court, the appellee instituted an action to foreclose a mortgage executed to him by the appellants, to secure the payment of four promissory notes, two of which were then due; the appellants did not appear to the action, and judgment was rendered against them upon default. The judgment was rendered for the sum due; the sum evidenced by the notes not due was stated in the decree, but the order was to sell sixty acres to satisfy the sum due, and no provision was made as to the sum not due. The mortgage described one hundred acres of land, but the decree directed that only sixty should be sold. The sheriff received a copy of the decree, and advertised and sold the one hundred acres described in the mortgage. Appellee was the purchaser; at the time of his purchase he received from the sheriff a certificate, and one year thereafter a deed. The prayer of his present complaint is that the judgment be reformed by inserting therein a provision for the issuing of a second execution, and that the sale made by the sheriff be set aside.

The complaint does not state facts entitling the appellee to

a correction of the decree entered in the foreclosure suit. A party who asks the reformation or correction of a judgment or decree must state such facts as show some material mistake. There are no facts stated fortifying the inference that there was any mistake in the decree rendered in the action upon the mortgage. It is not shown that appellee did not obtain just such a decree as he sought. As there was no appearance there was nothing to prevent him from obtaining a decree directing a sale of all the land, had such been the intention of the court. There is nothing to show that he intended that the decree should order the sale of all the property embraced in the mortgage, nor is there anything to show that the court did not intend that sixty acres and no more should be sold. For anything that appears, both the appellee and the court may have considered sixty acres as amply sufficient to satisfy the appellee's mortgage. At all events, there are no facts averred, from which it can be inferred that the court intended to enter any other decree than that which was entered upon appellee's own motion. A party who receives such a decree as he asks, and such as the court intended to grant him, can not have a reformation upon the ground of mistake. If the court was wrong in point of law, there is a remedy, but not such a remedy as that here adopted by the appellee.

A sheriff who sells upon a decree of foreclosure must sell the property therein described. The order of the court is the sheriff's authority. It is his duty to sell the property described in the decree issued to him. This much is plain. The effect of a departure from the order contained in the decree can not be allowed to injuriously affect the rights of the debtor, or those claiming through him. But this hardly meets the case now before us.

An execution plaintiff, who purchases at his own sale, is not a *bona fide* purchaser in such a sense as to entitle him to claim title free from infirmities arising from irregularities committed by the sheriff. Upon the contrary, it is well settled

that an execution plaintiff, who purchases at his own sale, is chargeable with notice of all irregularities. In *Meredith* v. *Chancey*, 59 Ind. 466, WORDEN, J., delivering the opinion of the court, said: "But it has long been settled in this State, that the plaintiff in an execution, purchasing the property at sheriff's sale, is chargeable with notice of all irregularities." *Sharpe* v. *Davis*, 76 Ind. 17; *Stotzenburg* v. *Same*, 75 Ind. 538; *Piel* v. *Brayer*, 30 Ind. 332; *Hamilton* v. *Burch*, 28 Ind. 233; *Keen* v. *Preston*, 24 Ind. 395; *Raub* v. *Heath*, 8 Blackf. 575; *Harrison* v. *Doe*, 2 Blackf. 1. The appellee was bound to know, and in contemplation of law did know, that the sheriff had no right to sell more than sixty acres. As the appellee, with full knowledge of all the facts, voluntarily placed himself in the position from which he now asks the court to extricate him, it is very doubtful whether he has made any case entitling him to relief. But we do not deem it necessary to place our decision upon the complaint, for the counter-claim of the appellants exhibits the case more fully than the complaint. This pleading admits the allegations of the complaint concerning the foreclosure suit and decree, avers that the one-hundred-acre tract was advertised and sold, that the appellees bid therefor the full amount of his mortgage, including principal, interest, and costs, and that he received a deed for one hundred acres, when he was entitled to a conveyance for only sixty acres. The prayer is that the appellee be decreed to be the owner of sixty acres, and that the remaining forty acres be declared free from the lien of said judgment and mortgage. We think that the counter-claim concedes to the appellee full as much, and perhaps more, than he is entitled to receive. If he can, as the counter-claim tenders him, secure title to sixty acres of land, he is receiving as much as by any possibility he can legally or rightfully obtain. With this he ought to be content. As the counter-claim expressly offers the appellee the sixty acres, the court may well adjudge it to him without stopping to enquire how

it would be if the appellant were resisting his right to any of the land.

Judgment reversed, with instructions to overrule the demurrer to the appellant's counter claim, and for further proceedings in accordance with this opinion.

No. 7407.

LEWIS ET AL. *v.* HARRISON ET AL.

PARTNERSHIP.—*Chattel Mortgage.—Lien.—Principal and Surety.*—Where, by the contract of copartnership, it is stipulated that one partner shall hold a lien upon the property of the firm, as indemnity for any liability he may incur as surety for the other, and afterwards the other partner mortgages his interest in the partnership property to a third person, without notice of this stipulation, the mortgage will be postponed in favor of the lien created by the stipulation, the mortgagee being charged with notice of the latter. WOODS, J., dissents.

From the Morgan Circuit Court.

W. S. Shirley, J. V. Mitchell, T. A. Hendricks, C. Baker, O. B. Hord and *A. W. Hendricks*, for appellants.

J. H. Jordan, W. R. Harrison and *W. E. McCord*, for appellees.

NIBLACK, J.—The complaint in this case was by James A. Lewis, Perry F. Douglass and Calvin F. Sims, against Henry Sims and Felix A. Rinehart, upon two chattel mortgages, executed by Rinehart to the plaintiffs upon his interest in certain partnership property, owned and held by the said Rinehart and Henry Sims, as partners in the business of farming, to secure the plaintiffs as the endorsers and sureties upon a bill of exchange held by Samuel M. Mitchell, on which Rinehart was principal, alleging that the plaintiffs had been compelled to pay the bill of exchange; that Rinehart had no other

property than that so mortgaged by him, and praying a settlement of the partnership business, and a foreclosure of the mortgages on Rinehart's separate interest in the partnership property.

Rinehart made default. The defendant Sims answered in general denial, and by way of cross complaint claimed a lien upon Rinehart's interest in the partnership property to secure him in money loaned to Rinehart on partnership account, and the individual account of the said Rinehart; also to secure him as surety on a bill in bank, the private debt of Rinehart, which lien the said defendant Sims averred was reserved to him by the articles of partnership between him and Rinehart.

The defendant Sims, after filing his answer and cross complaint, died, and William R. Harrison, having been appointed administrator of his estate, was substituted as defendant in his stead.

Issue being joined, the cause was submitted to the court for trial, and, at the request of the plaintiff, the court made a special finding of the facts, which may be summarized as follows:

That on the 1st day of February, 1864, Henry Sims and Felix A. Rinehart entered into partnership in the business of farming, for the period of one year, for the purpose of having farmed, for their joint benefit, a certain farm belonging to the said Henry Sims, known as the Jackson farm, and situate near Martinsville, Indiana, the said Sims to furnish the farm, and the said Rinehart the labor, and the proceeds to be divided equally, in accordance with written articles of partnership mutually signed by the parties; that on the same day Rinehart executed to the said Henry Sims a mortgage on his interest in certain personal property then on the Jackson farm and belonging to him and the said Sims as partners, as above stated, to secure the payment of a note of even date and payable one year after date, for $265.26, which mortgage was duly recorded on the next day after its execution; that said mortgage has since been fully satisfied and discharged; that,

during the progress of the partnership, entered into as above, to wit, some time in the year 1866, Rinehart became indebted to the First National Bank of Martinsville, upon his private account, and made a note to such bank for such indebtedness, with the defendant Sims as his surety; that all the stock, implements and other personal property used in carrying on their partnership business, were owned and held by the defendants Sims and Rinehart equally; that they also owned and held all the stock raised on, and the products of, the farm equally; that their partnership business was continued and carried on under their articles of partnership, herein above referred to, until the 16th day of August, 1871, when a new agreement in writing, concerning such partnership, covering the period of one year, was mutually executed by them, by which the partnership was extended to, and made to embrace, another farm, known as the Holbrook farm; that, by this new agreement, the defendant Sims was described as the party of the first part, and the said Rinehart as the party of the second part, it being stipulated therein that Rinehart was to do all the work, and to make all necessary repairs, on both farms, such repairs to be made under the direction, and with the consent, of the said Sims, and to extend to the farming implements and everything else used by the firm, and that Rinehart was not to cut any timber, nor to sell or otherwise dispose of any stock, grain or other property, on either of said farms, without the sanction of the said Sims; that this new agreement concluded as follows: "The party of the first part to hold and have a lien on all property now belonging to said firm, until the operation of the year is settled up between the said Sims and Rinehart, consisting of stock, corn, implements and everything else on said farm, to secure the said Sims for money advanced and endorsing bank notes, etc., or any other liability;" that afterwards it was mutually agreed that this new contract of partnership should run for an indefinite period of time; that the increased assets of the firm, under the new contract of

partnership, were owned and held as before, by both partners equally; that the bank debt of Rinehart, referred to as above, had been renewed from time to time, by Rinehart, with Sims as his surety, and remained then unpaid; that said firm carried on its farming operations under said last named articles of partnership, until the death of Sims, which took place on the 11th day of October, 1877; that said new articles of partnership were neither acknowledged nor recorded, as is provided by law for the acknowledgment and recording of mortgages, or other conveyances, nor in any other manner whatever; that since the death of Sims, to wit, in May, 1878, the said Harrison, as his administrator, was compelled to pay, and did pay, the bank debt of Rinehart, for which said Sims was surety, as above set forth, the bank having taken judgment against Sims as such surety; that, in the execution of said new articles of partnership, it was the intention of both Rinehart and Sims that such articles should create a lien in favor of Sims on all the partnership property, to secure him in his suretyship for Rinehart on said bank debt, and that it was understood that such a lien had been created, up to and until the commencement of this action; that Rinehart has never repaid to the estate of Sims the amount of money, or any part thereof, paid by Harrison, as the administrator of such estate, in discharge of the bank debt of the said Rinehart, and that there was then due to said estate for money so paid by the said Harrison, the sum of $1,367.50; that, in carrying on the partnership business, Rinehart was compelled to employ persons to assist him in doing the work on the farms, which he had obligated himself to perform; that he paid these persons in part by orders on merchants for goods, which were given and accepted upon his individual credit; that he also borrowed money with which he hired laborers to assist him on the farms; that in this way he became indebted to Samuel M. Mitchell in the sum of $730, about $300 of which was for goods so furnished on orders, and the rest for money borrowed; that, on the 21st day of January, 1876, Rinehart gave his in-

dividual note to the said Mitchell for the sum in which he had so become indebted, with the plaintiffs as his sureties; that afterwards, to wit, on the 20th day of April, 1877, the said Rinehart gave the plaintiffs the first mortgage sued on, and on the 17th day of May, 1877, he executed the second mortgage in suit, to secure the plaintiffs on account of their liability as sureties on said note to Mitchell; that the plaintiffs, at the time they took said mortgages, had no notice or knowledge of the existence of the new or last named articles of partnership entered into between Sims and Rinehart, as hereinabove described; that, when Rinehart executed these mortgages, he represented to the plaintiffs that there were no prior liens on the property included within them; that both of these mortgages to the plaintiffs were recorded within ten days after they were respectively executed; that, as such sureties for the said Rinehart, the plaintiffs have been compelled to pay, and have paid, said note to the said Mitchell; that Rinehart has in no manner repaid to the plaintiffs the amount paid by them for him to the said Mitchell, or any part thereof, and that there was then due to the plaintiffs from Rinehart, on account of their payment of said note to Mitchell, the sum of $851.19; that, at the time of the execution of the mortgages to the plaintiffs, and at the time of the trial, the condition of the partnership business was as follows:

Its total assets were of the value of two thousand, eight hundred and fifty-three dollars, and the value of the particular property named in the mortgages was two thousand six hundred dollars; that the firm of Sims & Rinehart owed no debts save such as it owed to its own members, Sims and Rinehart, respectively; that during the transaction of their partnership business the said Sims & Rinehart had, from time to time, reckonings of their mutual accounts so far as to adjust their several advancements to, and charges against, the firm, and against each other; that on the 6th day of January, 1876, they had such a reckoning, and Sims was found to be in-

debted to Rinehart upon partnership transactions, which had not been previously adjusted in the sum of $287.98, for which sum Sims executed his due-bill of that date to Rinehart, which amount it was agreed should be credited on notes held by Sims on Rinehart; that Sims acted as treasurer and cashier of the firm, and received all the money for property sold, and when Rinehart wanted money he drew it from Sims; that Sims would sometimes charge his advances to Rinehart on the partnership books, and at other times these charges on the books would be settled by notes from Rinehart to Sims; that in this way Sims held notes on Rinehart at the time this action was commenced as follows:

One for $350, dated June 14th, 1873, and due one day after date.

Another for $100, dated August 2d, 1873, and also due one day after date.

Another for $78, dated August 22d, 1873, and also due one day after date.

Another for $40, dated November 18th, 1873, and also due one day after date.

Another for $22.13, dated December 13th, 1873, and also due one day after date.

Another for $160, dated December 24th, 1873, and also due one day after date. That these were the notes referred to in the due-bill executed by Sims to Rinehart on the 6th day of January, 1876; that the money received by Rinehart on these notes, with the exception of $140, was expended by him in carrying on the business of the firm; that after crediting the amount of the due-bill on these notes, there yet remained due to Sims on such notes the sum of $343; that in adjusting the partnership accounts the said sum of $343 should be treated as having been advanced by Sims out of his private means; that Rinehart was insolvent, and aside from his interest in the firm had no property subject to execution; that by mutual agreement the stock, grain and the other property of the firm of Sims & Rinehart have been sold and con-

verted into money, subject to the rights of the several parties hereto in such stock, grain and other partnership property, which money, by further agreement, has been placed in the hands of the defendant Harrison, as administrator of the estate of Henry Sims, subject to the order of court in this cause; that the sum of $2,853 was realized from the sale of the entire partnership property, and that the specific articles enumerated in the plaintiff's mortgages sold for the aggregate sum of $2,600.

As conclusions of law from the foregoing facts, the court found:

1st. That of the said sum of $2,853, one-half, to wit, the sum of $1,426.50 should be paid to the estate of Henry Sims.

2d. That the sum of $343, the balance due to Sims on notes held against Rinehart, ought to be paid to the estate of the said Henry Sims out of the remaining half of said sum of $2,853.

3d. That the remainder of said last named sum, to wit, the sum of $1,083.50, ought to be retained by the defendant Harrison, as administrator of the said Henry Sims' estate, and credited upon the amount paid by him, as such administrator, on the bank indebtedness of Rinehart, for which the said Sims was surety.

To these conclusions of law the plaintiffs excepted, but the court, disregarding their exceptions, rendered judgment in accordance with the conclusions at which it had thus arrived.

The principal, and indeed the controlling, question in this case is, did the plaintiffs below, who are the appellants here, by their mortgages in suit, acquire a priority of lien upon the mortgaged property over that claimed by Henry Sims under the concluding clause of the new articles of partnership set out as above in the special finding?

Collyer on Partnership, vol. 1, p. 186, in treating of the separate interests of the several partners in a firm, and quoting from Lord Hardwicke, says that, "When an account is to be

taken, each is entitled to be allowed against the other everything he has advanced or brought in as a partnership transaction, and to charge the other in the account with what the other has not brought in, or has taken out more than he ought; and *nothing is to be considered his share, but the proportion of the residue on the balance of the account.*" This proportion of the residue to which each party is entitled upon final settlement is obviously what remains to him after all his obligations to the firm, and to the other members thereof respectively, arising out of the contract or articles of partnership, have been fully discharged.

Each partner has a specific lien on the partnership stock for moneys advanced by him more than his share, for the use of the copartnership, and the lien of each partner exists not only as against the other partners, but also against all persons claiming through them or any of them. Lindley on Partnership, 681.

The note to the First National Bank of Martinsville, upon which Henry Sims was surety for Rinehart, being the private and individual debt of Rinehart, the estate of Sims would have had no lien against the interest of Rinehart in the firm, in the absence of some express agreement conferring such a lien; but we know of nothing against the competency of Rinehart to stipulate as a part of the contract of partnership for the creation of such a lien in favor of his copartner, to guard against any loss or defalcation which might, incidentally or otherwise, injure the business of the firm, or might injuriously affect Sims as a member of the firm.

Sims and Rinehart having been in the joint possession of the partnership property in the prosecution of their business as partners, their individual creditors were required to take notice of their respective rights and interests in such partnership property, and of the prior claim which any other person, interested in the business of the partnership, might have had against such property.

No record of the articles of partnership was necessary to

charge individual creditors with notice of such rights and interests, and such prior claims.

The circumstances under which the appellants took their mortgages necessarily put them upon inquiry as to the terms by which Rinehart held an interest in the mortgaged property, and charged them with notice of any prior claim which Sims, as the partner of Rinehart, may have had upon it.

We are, therefore, of the opinion that the lien of the estate of Sims upon the partnership property had precedence of the liens conferred by the mortgages, and that the court below did not err in the conclusions of law at which it arrived. *Donellan* v. *Hardy*, 57 Ind. 393; *Over* v. *Hetherington*, 66 Ind. 365.

The judgment is affirmed, with costs.

ON PETITION FOR A REHEARING.

NIBLACK, J.—A petition for a rehearing has been filed in this case, upon which elaborate arguments on both sides have been submitted.

We have given all that has been said in support of, as well as against, the petition a very careful consideration, and are unable to reach a conclusion different from that announced in the original opinion. Much of the argument of the appellants is based upon the theory that the stipulation for the indemnity of Sims for advancements to and on account of liabilities incurred for Rinehart, contained in the agreement of partnership, was inoperative as against them, because the agreement containing the stipulation was not recorded, and because it was not shown that they had actual notice of the existence of such a stipulation at the time they took their chattel mortgages, thus assuming that so much of the agreement as related to such indemnity was analogous to and stood upon the same footing with a chattel mortgage.

In that respect the appellants are in error, as it was not necessary that the contract or agreement of partnership should

be even in writing, much less that it should have been recorded. Collyer on Partnership, section 3; *Holmes* v. *McCray*, 51 Ind. 358.

The general rule is, that the purchaser or assignee of personal property acquires no better or greater title to it than the vendor or assignor had in it, and that no writing is necessary for the sale or assignment of that class of property. It is only when the statute of frauds intervenes that a writing, or the record of a writing, becomes necessary. That statute provides that no assignment of personal property by way of mortgage shall be valid as against third persons, where possession of the property is not delivered to the mortgagee, unless in writing, and duly acknowledged and recorded, but neither that nor any other statute contains any similar provision as applicable to articles of partnership. 1 R. S. 1876, p. 505, section 10. Persons, therefore, acquiring, or attempting to acquire, an interest in personal property held in partnership, must take notice of the tenure by which such property is held, and must necessarily incur all the risks incident to the acquisition of that class of property from whomsoever obtained.

The facts found by the court show that, at the time the appellants obtained their mortgages on the property in controversy, the property was held by and in the actual possession of the firm of Sims & Rinehart, under an agreement with Rinehart that none of it should be sold, or otherwise disposed of, without the consent of Sims, and that Sims was to continue to hold and have a lien upon all of said property, to secure him against advances made to, and liabilities incurred on account of, Rinehart, presumably to enable Rinehart to better perform the obligations he had assumed as a member of the firm. That agreement not only continued Sims in the possession of the property, but greatly increased his authority and personal control over it, thus taking the security it afforded out of the provisions of section 10 of the statute of frauds, *supra*.

In the light of these facts, it has not been, and we think

can not reasonably be, contended that if Rinehart had not attempted to mortgage his supposed interest in the partnership property, he would have had any just claim to any of the proceeds of such property as against the estate of Sims. If, in such an event, Rinehart would have had no claim to any portion of the proceeds of the partnership property, we are utterly unable to recall any principle governing the transaction of partnership business, which would enable the appellants to assert a greater claim than Rinehart could have done.

Other questions are discussed, but regarding them as merely incidental, and entirely subordinate to those upon which we have expressed an opinion as above, we deem it unnecessary to extend this opinion by specifically ruling upon them.

The petition for a rehearing is overruled.

DISSENTING OPINION.

WOODS, J.—I am not able to concur in the decision made, and think a rehearing should be granted.

Passing by the questions, argued with great force by counsel for the appellant, whether the clause in the articles of co-partnership, relied upon as creating the alleged lien in favor of Sims, created any lien at all, and, if so, whether it extended to any property acquired after the making of the articles, I am clear that the lien was not such as third parties were bound to take notice of. The quotations from Collyer and Hardwicke and from Lindley are doubtless accurate statements of the law, but when it is said that "Each partner has a special lien on the partnership stock for moneys advanced by him more than his share, for the use of the co-partnership, and the lien of each partner exists not only as against the other partners, but also against all other persons claiming through them or under them—Lindley on Partnership, 681," reference is had to the lien which grows out of the relation of partners to each other, and which is given by law irrespective of any express provision therefor in the articles of copartnership. Of such lien the world is bound to take notice. Knowledge

of the existence of the partnership imports and is knowledge of the partnership lien, when the word is used in its proper [illegible].

But when it is undertaken, by special agreement incorporated in the articles of copartnership, to stipulate for a lien in favor of one of the copartners, which would not arise by implication of law from the fact and nature of the partnership, without a stipulation therefor, it seems clear to me that the law ought to be, and is, that such lien should not affect the rights of a *bona fide* third purchaser for value. Unless he has notice to the contrary, he has the right to presume that each partner's interest, or tenure, if that is the preferable word, is subject to no liens except for the discharge of partnership liabilities, and that when these have been discharged, his share of the net surplus is his own, as absolutely as any other form of property, and subject to the imposition of incumbrances in the same way, and only in the same way. That a partner may mortgage his interest before its ascertainment, and while the partnership continues, can not be doubted. The prevailing opinion concedes as much.

Now the doctrine is familiar and elementary, that the power of a partner to deal with the partnership property, and to bind the firm by contracts made in the partnership name, can not be limited by restrictions in the copartnership articles, unless the restriction is known to the party with whom he deals; and still stronger is the reason for saying that the power of the partner to deal with his own interest in the partnership property—his share of the net surplus which shall remain after the payment of partnership liabilities—can not be restricted by a stipulation in the articles for a lien which is not a partner's lien, but is for the securing of obligations, which, in a legal sense, are separate from, and independent of, the partnership transactions, and for which, as is conceded in the prevailing opinion, there would be no lien "in the absence of some express agreement."

The following is the language of Mr. Lindley, p. 325:

"By law every member of an ordinary partnership is the agent of the firm, so far as is necessary for the transaction of its business in the ordinary way, and to this extent his authority to act for the firm may be assumed by those who know nothing of the real limits of his authority. If his copartners have restricted his authority to narrower limits (which they are perfectly at liberty to do), still they will be bound to all persons dealing with him *bona fide* without notice of the restriction, so long as he acts within the wider limits set by law as above explained."

Again, at page 326, the author says:

"Restrictions placed by the partners upon the powers which each shall exercise do not affect non-partners, who act *bona fide* and without notice of the restriction."

And again, at page 682, the following:

"The lien of partners on the partnership property extends, as has been stated, to whatever is due to or from the firm, by or to the members thereof, *as such*. It does not, however, extend to debts incurred between the firm and its members, otherwise than in their character of members. It has therefore been held that if a partner borrowed money of the firm for some private purpose of his own, and then became bankrupt, his assignees were entitled to his share in the partnership, ascertained without taking into account the sum due from him to the firm in respect to this loan; and that the solvent partners were driven to prove against his estate in order to obtain payment of the money lent."

These doctrines are elementary, and of course may be found in the books of all the text-writers on the subject.

All I desire to add is expressed in the following extracts, taken from the appellants' brief:

"Now, if third persons are not bound to take notice of restrictions on the powers of partners which may be inserted in articles of copartnership, how can they be required to take

notice of a contract lien for a private debt disconnected from the partnership, which one of the parties may give to the other by a clause in the articles of copartnership? In case of the supposed restriction, the restriction has relation to the partnership business, and is properly made a part of the articles of copartnership, but still is not binding on third persons, in the absence of actual notice. In case of the supposed lien by one partner on his interest in the firm to secure to another partner a private debt, the matter has no connection with the partnership, and yet it is held that because it is in the articles of copartnership the world must take notice of it. Surely this is not the law, and ought not to stand as the decision of this court.

"The lien which one partner has on the property and effects of the firm for money advanced to the firm, or to a member thereof, to carry on the business of the firm is not the creature of any stipulation in the articles of copartnership, but it is the creature of the law and is incident to the partnership relation. It exists equally where no articles of copartnership are entered into as where they are. Now if one partner may have a lien as against third persons on the interest of another partner in the partnership property by so providing in the articles of copartnership, why may not such a lien be reserved in a parol contract of partnership? There is no law requiring a contract of partnership to be in writing, and this court has ruled that a contract of partnership may be formed without writing, even where the object of the partnership is to buy and sell real estate. *Holmes* v. *McCray*, 51 Ind. 358.

"If partners, in forming their copartnerships, may verbally reserve liens on the interest of one of the partners in the partnership property, of which liens third persons are bound to take notice, the statute law of the State providing for the making and recording of mortgages of personal property would seem to have been repealed without legislative intervention.

"We submit that the true rule on this subject is that possession of partnership property by a firm is notice to everybody of the *partnership rights* of each partner of the firm in the property so possessed, but that it is no notice of any contract right which one partner may have acquired in the contingent residue of another partner after the partnership shall have been wound up and the partnership debts shall have been paid."

No. 8578.

JONES *v.* JONES.

DECEDENTS' ESTATES.—*Widow's Rights Under Section 28 of Statute of Descents.—Growing Wheat.* A widow, occupying land for the year after the death of her husband, under section 2492, R. S. 1881, is entitled to the husband's share of wheat planted on the land by a tenant before the husband's death, which ripened and was harvested during such year.

From the Montgomery Circuit Court.

E. C. Snyder, for appellant.
T. H. Ristine and *H. H. Ristine*, for appellee.

BICKNELL, C. C.—This was an action by the appellee against the appellant, to recover damages for taking and carrying away wheat.

The appellee's husband died in May, 1879, seized of a dwelling-house and forty acres of land around it, which was his ordinary family residence. On this land the wheat was growing; it had been planted in the fall of 1878, by Abner Jones, under an agreement by which he was to have one-third of the crop for his labor, and the deceased was to furnish the seed and implements, and horses for sowing, cultivating and harvesting, and was to receive two-thirds of the crop. When the crop was harvested, Abner Jones took his one-third, and

the appellant, who was a son of the deceased, carried off the other two-thirds.

The appellee, as widow of the deceased, was occupying said house and said forty acres, under section 28 of the law of descents, 1 R. S. 1876, p. 413, which provides that "A surviving wife and minor children shall, in all cases, be allowed to remain in the ordinary dwelling-house of the family, and to occupy the same and the messuage thereunto appertaining, and fields adjacent, if any, not exceeding forty acres, free of rent, for one year from the death of her husband."

During this year, the wheat was carried away by the appellant, who claimed it as an heir of the deceased, on the ground that the rent follows the reversion. *Hendrix* v. *Hendrix*, 65 Ind. 329.

The cause was tried by a jury, who found for the appellee eighty-six dollars and thirteen cents.

The appellant assigns errors:

First. The court erred in overruling the demurrer to the complaint.

Second. The court erred in sustaining the demurrer to the first paragraph of the answer.

The appellant, in his brief, waives the first error assigned, by expressly declining to discuss it.

The first paragraph of the answer states, in substance, that the appellant is a son and heir of the deceased; that the deceased rented the land mentioned in the complaint to his son, Abner Jones, who was to pay for the use of the ground two-thirds of the crop, the deceased agreeing to furnish the seed, implements, and horses for sowing, cultivating and harvesting; that said wheat taken by appellant was part of the crop raised upon said land under said contract of renting.

There was no error in sustaining the demurrer to this defence; it was clearly insufficient. Section 28 of the law of descents, hereinbefore cited, has been construed by this court as follows: "A fair construction of this section means, we

think, that the surviving wife and minor children shall not only occupy the messuage and adjacent fields, if any, not exceeding forty acres, but that they shall receive, use and enjoy the fruits and products of the same, which naturally ripen, mature and come off during the year in which they have the right to occupy the premises. To restrict the meaning of the section to the mere occupancy of the fields, without the use and enjoyment of its products, would * * wholly frustrate the benefits and purposes contemplated in its enactment." *Swain* v. *Bartlow*, 62 Ind. 546. That case is decisive of the present case. There the property in controversy was wheat straw, planted by a tenant and ripened on the land during the widow's year. Here the property is wheat planted by a tenant, and ripened on the land during the widow's year. There is no difference in the principle. The ruling in the case of *Swain* v. *Bartlow*, *supra*, was recognized in the subsequent case of *Tucker* v. *Murphy*, 71 Ind. 576. The judgment of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellant.

No. 9285.

PARKER *v.* GODDARD.

TAX SALE.—*Complaint to Enforce Lien.*—A complaint to enforce a lien against land sold for delinquent taxes for the amount paid by the purchaser at a tax sale, which shows that the real estate owned by the defendant was subject to taxation, was listed for taxes, was sold for taxes, and purchased by the plaintiff, is sufficient to show that the sale gave the plaintiff a lien for the money paid, and the penalty prescribed by statute; it is not necessary to show a valid sale.

SAME.—*Defective Description.—Lien.*—Where in such case the evidence shows that the land sold was owned by the defendant, was intended to be listed, that the taxes paid by the plaintiff were intended to be charged against that land, and that they should have been paid by the defendant, a defective description of the real estate will not defeat the lien.

From the Decatur Circuit Court.

C. Ewing, J. K. Ewing, S. A. Huff and *G. W. Galvin*, for appellant.

W. H. Goddard, W. A. Moore and *B. F. Bennett*, for appellee.

ELLIOTT, C. J.—The third paragraph of the appellee's complaint shows that real estate owned by the appellant was subject to taxation, was listed for taxes, was sold for taxes and purchased by appellee. The facts stated clearly show that the sale gave the appellee a lien for the money paid by him and the penalty prescribed by statute. It is not necessary that the complaint should have shown a valid sale, for, although a tax sale is insufficient to carry title, the purchaser has a right to enforce a lien against the land. *Sloan* v. *Sewell, ante*, p. 180, and authorities cited.

The evidence shows that there was some inaccuracy in the description of the land, but this does not entitle appellant to escape payment of taxes upon property which he actually owned. It clearly appears that the land owned by him was intended to be listed; that the taxes paid by appellee were intended to be charged against that land, and that they should have been paid by him. In such a case, a defective description will not defeat the lien, although it may, perhaps, prevent the acquisition of title. *Cooper* v. *Jackson*, 71 Ind. 244; *Sloan* v. *Sewell, supra*.

Judgment affirmed.

No. 10,117.

The State v. Fry.

From the Marion Criminal Court.

D. P. Baldwin, Attorney General, *W. W. Thornton* and *J. B. Elam*, Prosecuting Attorney, for the State.

Z. K. McCormack, for appellee.

Worden, J.—This case is similar to the one between the same parties, *The State* v. *Fry*, *ante*, p. 7; and for the reasons therein stated the judgment below must be affirmed.

The judgment below is affirmed.

END OF NOVEMBER TERM, 1881.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

AT INDIANAPOLIS, MAY TERM, 1882, IN THE SIXTY-SIXTH YEAR OF THE STATE.

81 297
150 676

No. 10,178.

BOARD OF STATE-HOUSE COMMISSIONERS *v.* WHITTAKER.

STATE-HOUSE.—*Statute Construed.*—The new State-House is, by the act of 1877 (Acts 1877, Spec. Sess., p. 68), required not to cost for its construction more than $2,000,000, but this does not include incidental expenses, such as salaries, travelling expenses of the board and rents; and the board has authority to expend that sum for construction alone.

From the Marion Circuit Court.

D. P. Baldwin, Attorney General, for appellant.

J. L. Griffith and *A. F. Potts*, for appellee.

WORDEN, C. J.—This was a complaint by the appellee against the appellants, to enjoin the latter from expending more than the sum of $2,000,000 in the construction of the new State-House, including all incidental expenses.

The complaint charges, among other things, that the defendants "are about to make certain changes, alterations and modifications in the construction of said State-House, which will increase the cost of the same beyond the said $2,000,000

limit, provided the said defendants are required to pay out of said $2,000,000 all incidental expenses connected with the erection and construction of said State-House building, such as the architect's salary, the superintendent's salary, the travelling expenses of the board, etc.; which items of expense your petitioner respectfully contends said commissioners are obliged to pay out of said $2,000,000 appropriation; that said contemplated changes, alterations and modifications consist in part in the substitution of marble wainscoting for wainscoting of Indiana wood and stone, as originally arranged and contracted for, at an additional cost of $50,000; that the changing of the main staircases in said State-House building, from iron to marble, will increase the cost of the same at least $20,000; that the said defendants have in contemplation, and are about to make, a number of other changes in the construction of said building, which, in connection with the changes already detailed herein, and under the construction of said law contended for by this petitioner, will materially increase the cost of said State-House building beyond the said $2,000,000 limit. Your petitioner further charges that said defendants, unless restrained by the order of this court, will proceed to make the above indicated changes, alterations and modifications," etc.

The defendants answered, "That the alleged changes, together with the original contract price of the new State-House, exclusive of incidental expenses, will not exceed $2,000,000; but if the incidental charges (expenses), such as the salaries of the board, their travelling expenses, and other incidental expenses named in the plaintiff's complaint, are taken from the $2,000,000, the total cost will exceed $2,000,000, and said changes and improvements can not be made. Wherefore," etc.

A demurrer for want of sufficient facts was sustained to this answer, and there was judgment enjoining the defendants from expending more than two million dollars in the construction of the building, including salaries, travelling ex-

penses, commissions of architects, and every other expense named in the plaintiff's complaint connected with the building of said new State-House.

We are of opinion that the decision below was wrong, and based upon a wrong construction of the statute providing for the erection of a State-House. Acts 1877, Spec. Sess., p. 68.

In the case of *Williams* v. *Mansur*, 70 Ind. 41, we held that the rent of a building for the use of some of the officers of State, the State-House commissioners being required to furnish the building for the use of such officers, was payable out of the fund designated the "New State-House Fund;" but that the sum so paid constituted no part of the $2,000,000 which might be expended in the construction of the new State-House. There is, however, the following *dictum* in that case, which was not necessary to the decision of the cause and upon which we may suppose the court below acted. We said: "The sum of $2,000,000 was doubtless intended to cover everything pertaining to the construction of the new State-House, including salaries of commissioners, secretary to the board, etc." This proposition was unadvisedly embodied in the opinion with a view to point out a distinction between the rent then in question, and expenses more nearly connected with the construction of the building, the question concerning the rent being the only one involved in the case.

Upon a more careful consideration of the various provisions of the statute, we are of opinion that it was the legislative intention, that the sum of $2,000,000 might be expended in the *construction* of the new State-House; and that, in addition thereto, all incidental expenses, such as salaries and travelling expenses of the board, compensation of architect, secretary and superintendent, rents, etc., may be paid out of the fund denominated the "New State-House Fund," but that these expenses are not to be deducted from the $2,000,000 which may be expended in what may be strictly called the construction of the building.

The judgment below is reversed, with costs, and the cause remanded for further proceedings in accordance with this opinion.

81	300
124	512
126	86
125	126
81	300
130	4
81	300
132	72
81	300
134	695
136	694
81	300
144	451
81	300
159	675
81	300
163	995
81	300
171	414

No. 8649.

Willcuts v. The Northwestern Mutual Life Insurance Company.

Demurrer to Evidence.—*Practice.*—A demurrer to the evidence admits all facts which the evidence tends to prove, and all such inferences as can be reasonably drawn therefrom, but forced and unreasonable inferences are not admitted.

Same.—*Effect of.*—The effect of a demurrer to the evidence is to concede the truth of all the facts of which there is any evidence against the demurring party, and to prevent him from insisting upon the benefit of evidence in his favor, if there is a conflict in the evidence.

Life Insurance.—*Provision Forfeiting Policy for Non-Payment of Premium.*—Where a policy expressly and fully provides that a failure to pay premiums at the times therein stipulated shall cause a forfeiture, the failure to pay as stipulated will, unless some excuse or waiver is shown, work a forfeiture of the policy.

Same.—*Right to Recover Proportionate Part of Insurance on Partial Payment of Premium.*—Where the policy expressly provides that a failure to pay premiums at the times stipulated shall cause a forfeiture, the insured is not entitled because of payment of part of the premium to recover a proportionate amount of the policy. In such a case the rule that where one does work under a special contract, but does not perform the entire contract, he may recover upon the *quantum valebat*, has no application, for such a contract of insurance is an indivisible one.

Same.—*Custom as to Payment of Premium.*—A custom, that a payment of the premium may be made in a different manner from that provided in the policy, can not, even upon a demurrer to the evidence, be inferred from a single act. The fact that the insurance company in one instance allowed credit to the insured for a claim for services, and accepted the balance of the premium in money, does not warrant the inference of a custom to accept pay in services.

Same.—*Policy.—Conditions.—Covenants.*—Where there is a full and valid express covenant or condition in a policy of insurance, there can be no implied one, respecting the same subject.

Willcuts *v.* The Northwestern Mutual Life Insurance Company.

SAME.—*Modification of Policy by New Parol Contract.*—A policy may be modified by a new and distinct parol contract.

SAME.—*Member of Mutual Insurance Company.*—The fact that the insured becomes a member of a mutual life insurance company does not prevent a lapse of his policy and a termination of liability upon it by reason of his failure to perform the conditions required by the terms of the policy to keep it in force. The stipulations of the contract and its construction are none the less binding, because made between the corporation and a member.

SAME.—*Waiver of Condition in Policy.—Power of General Agent.*—A general agent of a foreign insurance company, possessing competent authority, may waive the condition in the policy that the premium should be paid in money. A mere local agent could not. (As to what will constitute such waiver see opinion p. 309.)

SAME.—*Payment of Part Premium.*—An insured member of a mutual life insurance company is not entitled to a proportionate part of the amount of his policy of insurance, when only a part of the premium is paid, in contravention of the conditions of the policy, that if not paid on a certain day it should cease.

SAME.—*Tender of Premium.*—An insurance company, by demanding more than it is entitled to receive, and notifying the insured that nothing but a compliance therewith will be deemed performance, will excuse the insured from tendering the premium; but a notice requesting payment of a premium, calling attention to the conditions of the policy, etc., can not be construed as intended to mean that the company repudiated an agreement to receive as part payment of the premium a bill for services of the insured, and excuse him from the payment of the balance of the premium, in accordance with the terms of the policy.

SAME.—*Construction of Policy.*—Where parties have, by their own acts under the policy, placed a construction upon a policy of insurance, the courts will carry that construction into effect.

From the Grant Circuit Court.

F. M. Finch, J. A. Finch, G. W. Harvey, L. D. Baldwin and —— *Baldwin,* for appellant.

T. A. Hendricks, C. Baker, A. W. Hendricks, O. B. Hord, I. Van Devanter and *J. W. Lacey,* for appellee.

ELLIOTT, J.—The complaint of the appellant is in three paragraphs. The first alleges that the appellee issued a policy of insurance upon the life of Leander E. Willcuts, the appellant's husband; that, at and prior to the time the policy was issued, the insured was appellee's examining physician for

Grant county; that the agreement between him and appellee was that the premium should be credited with the fees that should become due for services as medical examiner; that under this agreement the first semi-annual premium was paid partly in fees and partly in money; that afterward Dr. Willcuts examined applicants and became entitled to a credit of $3 on his second premium; that the appellant refused to allow the credit, and notified the insured that if he did not pay the whole premium in money, the policy would be declared forfeited; that he was ready and willing to pay the remainder of the premium, after the proper credit should be made; that the insured refused to accede to the demand, and forfeiture was declared. It is also alleged that the company is a mutual one; that the insured became a member of it, and that for this reason the policy could not be forfeited. It is further alleged that if the fees had been ratably applied, it would have kept the policy in force until October 16th, 1878, and that the insured died on the 8th day of that month.

The second paragraph is much like the first. In one material particular, there is a difference between the two. The former paragraph, instead of charging that an express agreement was made for the application of the fees of the insured to the payment of the premium, alleges that, by a custom acquiesced in by him and the company, they were to be so applied.

The third paragraph, in many respects, is similar to the first and second, but, omitting all reference to the agreement and custom concerning fees, alleges that a part of the premium was paid in money, and that, as the company was a mutual one and the insured a member, the beneficiary was entitled to a proportionate part of the insurance, although a part only of the premium was paid.

It is to be observed of all the paragraphs of the complaint, that they make due averments of death, proof of death, and kindred matters.

We have only outlined the complaint, and deem it unnecessary to give even a brief synopsis of the appellee's answer,

for the reason that the only questions in the case arise upon the demurrer addressed to the evidence by the appellee. The answers were sufficient to put the appellant to the proof of all the material facts essential to a cause of action under some one of the paragraphs of the complaint.

There are principles applicable to demurrers to evidence, which it is well to state at the outset:

First. A demurrer to the evidence admits all facts of which there is any evidence, and all inferences which can be logically and reasonably drawn from the evidence. *Fritz* v. *Clark*, 80 Ind. 591; *The Ohio, etc., R. W. Co.* v. *Collarn*, 73 Ind. 261; *Miller* v. *Porter*, 71 Ind. 521; *Newhouse* v. *Clark*, 60 Ind. 172; *Eagan* v. *Downing*, 55 Ind. 65; *Andrews* v. *Hammond*, 8 Blackf. 540; *McCreary* v. *Fike*, 2 Blackf. 374; Buller N. P. 313.

Second. All reasonable and natural inferences which may be drawn from the evidence are admitted, but forced and unnatural ones are not. In speaking of a party who had demurred to the evidence, MARSHALL, C. J., said: "Forced and violent inferences he does not admit; but the testimony is to be taken most strongly against him, and such conclusions as a jury might justifiably draw, the court ought to draw." *Pawling* v. *The United States*, 4 Cranch, 219. In a note to 2 Tidd's Pr. 865, this passage is quoted: "The court will also, on the argument of the demurrer, make every inference of fact in favour of the party * * * which the jury might with the least degree of propriety have inferred; but they ought not to make forced inferences." 1 Trou. & Haley's Pr. 509.

Third. In considering the evidence demurred to, the courts will not weigh it to determine whether a fact, of which there is any evidence, has or has not been proved, nor will they consider such evidence as is favorable to the demurring party, if there be any opposing evidence. In the book referred to, it is said: "So, if the evidence conflict, the party demurring must admit that of his adversary to be true so far as it conflicts with his own. So, if the plaintiff call several witnesses

to prove the same transaction, some of whom testify unfavourably to him and others in his favour, the defendant, by demurring to the evidence, admits that the latter have told the truth, and so the court must take it, though the jury would have believed the former." 2 Tidd Pr. 865. The ancient rule seems to have gone much farther than the modern. It is said in Buller's Nisi Prius, that "If the plaintiff or defendant give in evidence matter of record, or writings, or parol evidence on which a doubt in law arises, the other side may demur to the evidence; otherwise if there be a doubt whether the fact be well proved, for the jury may find it on their own knowledge."

We are satisfied that the evidence does not make out a case under either the second or third paragraphs of the complaint. We find no difficulty at all in holding that the evidence is wholly insufficient under either of the paragraph named; the only difficult questions are such as arise under the first paragraph. A clearer view can be presented, and brevity attained, by disposing of the case viewed with reference to the last two paragraphs of the complaint.

A custom can not be inferred from a single act. It would be a strained and violent inference which would lead to the conclusion from one act alone, that a custom existed. The only evidence in support of the custom alleged in the second paragraph is, that at the time the policy was written, the fees of Dr. Willcuts and those of another physician, which had been transferred to him, were accepted in part payment of the first premium. A single transaction, occurring at the very threshold of the dealings between parties who have put their contract in writing, can not be deemed proof of a custom. The single instance proved does not in any degree tend to warrant the inference that the appellee agreed to employ Dr. Willcuts permanently, and allow him to pay the premiums in services. The mere fact that he was allowed to make use of his own claim of three dollars, and that of his assignor for a like sum in payment, does not authorize the intendment, as against the

express words of the contract, that he was to pay all future premiums in that way. It would be a most violent and unnatural process which would lead to any such conclusion.

The written contract of the parties, in very explicit terms, makes the payment of all premiums at the designated times a condition precedent to the right to the insurance. It is expressly provided that in case default is made after the payment of three or more annual premiums, a paid-up or non-participating policy will be issued for an amount calculated in accordance with the tables used by the company. It is also stipulated: "If the said premium shall not be paid on or before the days above mentioned for the payment thereof, then, and in every such case, this policy shall cease and determine, and no premium on this policy shall be considered paid unless a receipt shall be given therefor, signed by the president and secretary, and the payment and receipt of any premium less than a full annual shall not have the effect to continue this policy in force longer than three months in case of a quarterly payment, or six months in case of a semi-annual payment." It is further provided that a consideration of the contract is the payment in cash of the semi-annual premium of eleven and twenty-four hundredths dollars before noon on or before the 27th day of February and August in each year. If it were conceded that the evidence warrants the inference that the sum of three dollars due the insured for services as medical examiner was accepted in payment, it would not entitle the beneficiary to recover a proportionate share of the insurance. The rights of the parties are fixed and defined by the written contract, and unless there is a new contract made modifying or abrogating the original, it must control. We know of no case applying to such a policy of insurance as that under consideration the rule that where services are performed under an express contract, their reasonable value can be recovered under a *quantum valebat*, although there is not a full performance. The case of *Manhattan L. Ins. Co.*

v. *Hoelzle*, decided by the Supreme Court of the United States, does not give us any light. We are unable to ascertain what the provisions of the policy were, or upon what point or points, the judgment was affirmed. All that we can learn from the case as reported in the only book now accessible, 8 *Insurance Law Journal*, 226, is that the court was evenly divided, it then being composed of eight judges. No opinion was delivered and we are unable to learn upon what point or points the court decided. It is certainly very doubtful whether the rule stated can be applied to any contract of insurance; but, however this may be, we do not think it can be applied to the one in hand. The references already made to it show very clearly that the parties made the payment of all the premium at the times designated, a condition precedent to the right to any part of the insurance. The contract goes further, for it provides that where there is a failure to pay the premium the policy shall "cease, determine," except in cases where at least three annual payments have been made, and that in such a case a non-forfeitable or paid-up policy shall issue. It can not be doubted that the contract, in most explicit terms, makes the right to the insurance an indivisible one. Not only is it provided that the failure to pay the premium shall forfeit the policy, but an express provision is made for the case of a failure after stated premiums have been paid. There can be no implied condition or covenant where there is an express one. Courts can not thrust into a contract provisions excluded by the parties, nor displace those they have written in it. To do this, would be to make, not enforce, contracts.

If there had been a new and distinct contract, abrogating or modifying the old, it would be different. We do not doubt that a contract may be modified, or even abrogated, by parol; but there is not a spark of evidence tending to show that this contract was so modified as to entitle the beneficiary to a proportionate part of the insurance upon the payment of a part of the premium.

Counsel contend that, as the company is a mutual one, the rule applicable to companies of a different character should not apply. We are unable to perceive any reason upon which this position can rest. The policy holder makes a contract with a corporation, and that contract must govern, although he is not a stranger in the literal sense, but a member of the corporate body. The corporation is as to him, as it is to all natural persons, a different and distinct person; and the contract has, so far as concerns the question under immediate discussion, precisely the same force and effect as though made with an entire stranger. All of the stockholders are interested, it is true, but their interests are not of such a nature as to require courts to give their contracts of insurance a different force and effect from others of a similar character. In all contracts of insurance, whether executed by mutual insurance companies or not, there are two parties with adverse interests, and the measure of their rights is supplied by their contract. Its terms can not be changed, nor its stipulations made nugatory, because the insured is a stockholder and entitled to share in the profits arising from the business of the company. There is no principle upon which the doctrine for which appellant contends can be placed, and it certainly finds no recognition from the adjudged cases. The stipulations of a written contract are not the less binding because made between a corporation and one of its members; nor are the rules of construction in such cases different from those which obtain in contracts between corporations and strangers.

We come now to the questions which arise when the case is viewed under the first paragraph of the complaint.

It is now proper to refer to other stipulations of the policy than those already examined. Endorsed on the policy, in a conspicuous place, is this: "Agents having the receipts, and then only, will receive the premiums when due or before; but agents are not authorized to waive forfeitures, to make, alter or discharge contracts; and no receipt will be binding on the company, unless signed by one of its officers, and countersigned

by the agent. No agent has authority, in any case, to waive or postpone payment of premiums, and the assured is hereby notified that the only evidence to him of the authority of an agent to receive any premiums on account of this policy is a receipt in printed form, signed by the president or secretary of the company." Strong as these stipulations are, it was competent for the insurance company to waive them. An insurer may waive, even by implication, the performance of conditions written in the policy. Wood Ins. 176, 832; May Ins., sections 360, 363. Cases cited by the author last referred to show that this principle has been applied to policies containing provisions quite as full and strong as those written in that declared upon in this case. The general rule has been repeatedly recognized and enforced by this court. *Behler* v. *The German, etc., Ins. Co.*, 68 Ind. 347; *The United States, etc., Co.* v. *The President, etc., Co.*, 42 Ind. 588; *The Kentucky, etc., Co.* v. *Jenks*, 5 Ind. 96.

The doctrine of waiver is liberally administered where the thing claimed to have been waived is not of a very material character. Whether the company in the present instance received money or medical services equal in value to the amount of the premium, was not material. Payment may be made in whatever thing of value the parties may agree to accept as payment. *Louden* v. *Birt*, 4 Ind. 566. Whether payment was made, or was to be made, in medical services or in money, was not the material matter. The essential thing was not the medium of payment, but the value of the thing given or done as payment. We have before us, therefore, a case where the doctrine of waiver should be liberally applied in order to avert a forfeiture.

It is settled that a waiver of a condition of a policy can only be made by an agent possessing competent authority. *Franklin Life Ins. Co.* v. *Sefton*, 53 Ind. 380. We think the case cited must be regarded as declaring that a mere local agent of an insurance company can not waive any of the material conditions written in the policy.

The questions which next present themselves are these: First. Was there a waiver of the condition that the premium shall be paid in money? Second. If there was such a waiver, was it made by an agent having authority to act for the corporation? Of these, in their order:

First. Lenfestey was appellee's local agent at Marion, in this State; Dr. Willcuts, the insured, was the medical examiner, and paid the first premium in the manner heretofore described. Before the second became due, he had earned three dollars as medical examiner. Lenfestey, in his testimony, said, in speaking of this matter: "On the day it fell due, I asked him to pay the premium on the policy; don't remember of any particular claim being spoken of at the time; something was said about the premium; that the difference between the amount due him and the amount due on the policy was $8.39." This witness also said, that he told Dr. Willcuts he would write to the general district agent on the subject; that he did write, and received an answer, which, omitting formal parts and signatures, reads as follows: "I did not pay Dr. Willcuts for the examination of S. P. Eversale, as he wanted the examination to apply on his premium." Taking all the evidence into consideration, and applying the rule that all reasonable intendments must be made in favor of the party whose evidence is demurred to, it must be held that there was a waiver of money payment to the extent of three dollars. It is true that there are some portions of the evidence which are in appellee's favor, and tend strongly to show that there was no waiver, but the course pursued precludes us from weighing the evidence, and, indeed, from doing anything more than considering that which is favorable to the appellant.

Second. We are constrained to the opinion that the second of the questions stated must be answered against the appellee. It appears from the evidence that the appellee is a foreign insurance company; that H. C. Martin was its agent for the northern district of Indiana; that within the territory assigned he was its principal agent, and that he had no superior officer

or agent in this State. Under the rule declared in the recent case of *Phœnix, etc., Ins. Co.* v. *Hinesley*, 75 Ind. 1, Martin must be regarded as representing the corporation in this State, and as clothed with authority broad enough to waive the performance of such a condition as that relied upon to defeat the appellant. The waiver was really of a non-essential matter, for whether money was actually paid, or its equivalent in value yielded to the corporation, was not of controlling importance. If the agent had taken a certificate of deposit or a draft, we suppose no serious question would have been made, and we can not perceive that the principle is different because he contracted to take what was really equivalent to money, although in the form of professional services. Under the rule applicable where a demurrer to the evidence is interposed, it must be inferred that Martin authorized the application of the sum due Dr. Willcuts to the payment of the August premium, and that his act was obligatory on the corporation which he represented.

Assuming, as we must, that there was a waiver; that it was made by the authorized agent of the company; that the three dollars due the insured for the examination of the applicant, Eversale, was a payment on the August premium, what are the rights of the insurer and beneficiary? The question which faces us is not free from difficulty. The sum due Dr. Willcuts did not pay the premium, and there is no evidence from which it can be inferred that he paid, or offered to pay, the remainder of the premium. By stretching the rule that intendments are all against, and strongly against, one who demurs to his adversary's evidence, to its utmost tension, it may be inferred that the insured understood and intended that the sum should be applied to the payment of the premium, and that the company's agent joined him in this; but the rule can not be extended far enough to allow the inference that there was payment, or offer of payment, of anything more.

Appellant's counsel offer two theories in support of their contention that the evidence justified a recovery, although no

payment, or offer of payment, of the amount of the premium in excess of the value of the services was made. The first of these is, if we understand counsel aright, that the company was bound to apply the sum due the insured to the premium, that this was a payment *pro tanto*, and entitled the beneficiary to a proportionate share of the insurance. We have already expressed our opinion that the right to the insurance is not a divisible one, and that the payment of the whole premium was a condition precedent to a right to recover any part of it. But if we are wrong in this, still there can not under the evidence, unless resort is had to violent and unnatural inferences, be any conclusion that either the corporation or the insured meant that all the premium should be so paid. The utmost that can be claimed with any tincture of reason is, that the value of the services should be credited, and the remainder paid in cash. The case of *The Girard L. Ins., etc., Co.* v. *Mutual, etc., Ins. Co.*, decided by the Supreme Court of Pennsylvania, and reported in 9 Weekly Notes of Cases, 425, decides that, where the company has in its hands as dividends due the insured a sum in excess or equal to the premium, it is bound to apply it to the payment of the premium, and can not in such a case declare the policy forfeited. In that case it was said: "Was it conscionable for the defendant company to forfeit this policy when it had in its hands more than enough of the assured's money to pay the quarterly premium due on the 14th of January?" It is obvious that the case cited, even if the doctrine it asserts be unqualifiedly accepted, does not meet the question here confronting us. The principle of that case fully applied would do no more than entitle the beneficiary to treat the sum due the insured for services as a payment in part of the premium, leaving unpaid the greater part.

We unhesitatingly assent to the proposition that where parties have, by their own acts, placed a construction upon a contract, the courts will adopt and enforce the contract as thus construed. *Reisner* v. *Orley*, 80 Ind. 580; *Johnson* v. *Gibson*, 78 Ind. 282; *Aimen* v. *Hardin*, 60 Ind. 119; *Insurance*

Co. v. *Dutcher*, 95 U. S. 269. But granting the rule, and giving it the utmost force possible, it only brings us back again to the original difficulty; it does not enable us to surmount it. The construction given the contract, allotting to the evidence the effect most favorable to the appellant, is, that the services were to be credited and the remainder of the premium was to be paid in money. So the rule does not enable us to make one step of progress.

The second of the theories, by which appellant seeks to escape the difficulty caused by the failure to pay or tender the amount of the premium in excess of the value of the services of Dr. Willcuts, is, that the act of the company excused performance.

The law unquestionably is, that, if performance is prevented by the act of one of two contracting parties, the other is excused from tendering performance. So, too, if one party avows an intention not to perform, it will, in most cases, excuse the other from offering to perform his part of the contract. *Ruble* v. *Massey*, 2 Ind. 636; *Turner* v. *Parry*, 27 Ind. 163; *Phœnix, etc., Ins. Co.* v. *Hinesley, supra.* An insurance company, by demanding more than it is entitled to receive, and notifying the insured that nothing but a compliance with the demand will be deemed performance, will excuse the latter from tendering the premium. May Insurance, 2d ed., section 358. To state the general rule is easy enough; but to always properly apply it, is a perplexing and difficult task.

The single fact which appellant relies on to show that performance on the part of the insured was excused is, that on the first day of July, 1878, a notice was issued by the company, and a week or two after its issue served on Dr. Willcuts. The notice, omitting heading and signature, is as follows: "The second S. A. premium of $11.39, on your policy No. 95,594, falls due at the office of the company in Marion, Indiana, before noon on the 27th day of August, 1878. The conditions of your policy are that payment must be made on or before the day the premium is due, and members neglect-

ing so to pay are carrying their own risk. Members should not assume that it is just as well to pay at any time during the month. Agents have no right to waive forfeitures, or to restore lapsed policies. Upon a receipt of a proper certificate of good health, in accordance with its rules, and within one year from date of lapse, the company will restore lapsed policies. Please present this notice at time of payment. Prompt payment is necessary to keep your policy in force." We are unable to assign to this notice the force claimed for it by the learned counsel for appellant. Liberal as is the rule to be applied in favor of their client, it will not justify the inference that the company would refuse to make the proper credit and receive nothing less that the whole amount of the premium in money. The notice is nothing more than the usual one informing the insured of the time his semi-annual premium is due, and calling attention to the conditions of the policy. By no possible intendment, within the bounds of reason, can it be construed as meaning that payment must be made in money, and that no credit for services will be allowed. Broad as is the rule which here comes to the assistance of the appellant, it will not justify the inference that the company either meant to, or did, notify the insured that his claim for services would not be allowed in part payment. We can not agree with counsel, that the company repudiated any agreement with Dr. Willcuts. Conceding the claim of appellant that the latter was entitled to a credit on the premium for services rendered, yet it is clear that this credit was not to be made until the payment of the premium, and then to be taken *pro tanto* in payment. There is no evidence justifying any inference under the most liberal rule conceivable, that a credit was to be entered as the services were rendered. The utmost that can be said is, that there was an agreement, that when the premium became due it might be paid partly in services and partly in money.

The case of *Phœnix, etc., Ins. Co.* v. *Hinesley, supra*, is essentially unlike the present upon the point under immediate dis-

cussion. There the contract required the payment of interest on premiums, at the rate of six per cent., the company demanded seven per cent., and it was held that this was notice to the insured that the company would not receive payment at the contract rate, and excused performance. It was said by HOWK, C. J., by whom the opinion of the court was delivered: "If, as alleged, the appellant wrongfully, and in violation of its agreement with the appellee, demanded of her that she should pay the interest on the outstanding notes at the rate of seven per cent., when six per cent. only was payable thereon, and notified her that six per cent. interest would not be received, if tendered, and that no other or succeeding premiums would be received on said policy unless the rate of seven per cent. was paid on said notes, it is very clear, we think, that the appellee was thereby and thereafter excused from the performance of her part of her agreement with the appellant." The notice in the present case does not call upon the insured to do anything more than his contract required him to do. It notified him that he was expected to pay according to the agreement; it apprised him of the time of payment, directed attention to the conditions of the contract, and warned him of the consequences of non-performance.

The solitary fact favorable to the appellant, if it can be said to be favorable, is this notice. The testimony of Lenfestey, the local agent, indicates very strongly that the insured desired not to apply on the premium the three dollars due him for services, but desired that it should be paid to him. We quote from the testimony of this witness: "In the conversation I had with him" (the insured), "he said there was three dollars due him, and asked who was to pay it; don't think he said what he wanted to do with it; I told him I would write to Dr. Martin about it; I don't call to mind which of us said there was $8.39 after the payment of the $3; it was prior to that he asked who would pay the $3." This conversation took place three or four weeks before the time the premium became due. Whether this testimony does,

or does not, show that there was an agreement to permit Dr. Willcuts to pay premiums in professional services is not, at this point, the enquiry. The question here is: Does it tend in any degree to prove that the company either repudiated the agreement, or refused to permit the proper credit to be given? It certainly does not tend to prove anything that excused the insured from tendering performance of his part of the agreement.

The judgment must be affirmed.

No. 10151.

THE STATE *v.* BUNNELL.

CRIMINAL LAW.—*Affidavit and Information.—Statute Construed.—Witnesses.*—Section 1679, clause 5, R. S. 1881, construed in connection with sections 1671 and 1756, does not imperatively require the names of the witnesses to be stated in the body of the affidavit on which an information is based; and it is error to quash it for the omission to do so.

From the White Circuit Court.

D. P. Baldwin, Attorney General, *F. P. Hench*, Prosecuting Attorney, *W. S. Hartman*, —— *Owens* and *W. E. Uhl*, for the State.

A. W. Reynolds and *E. W. Sellers*, for appellee.

NIBLACK, J.—This was a prosecution upon affidavit and information for selling intoxicating liquor without a license.

The body of the affidavit was as follows:

"Peter Hemmer, being duly sworn, on his oath says that Thomas J. Bunnell, on the 16th day of January, 1882, at the county of White and State of Indiana, did unlawfully sell to one Peter Hemmer intoxicating liquors, to wit, one quart of intoxicating liquors, at and for the price of twenty cents, to be drank and suffered to be drank in the house and appurte-

nances thereto belonging of him, the said Thomas J. Bunnell, he, the said Thomas J. Bunnell, not then and there having a license to sell intoxicating liquors to be drank or suffered to be drank in his said house, or the appurtenances thereto belonging, according to the laws of the State then in force, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Indiana." The names of Peter Hemmer and Mike Burke were endorsed on the affidavit as witnesses.

As to its substantial averments the information followed the affidavit.

On motion of the defendant, Bunnell, both the affidavit and information were quashed and he was discharged.

The State has appealed and assigned error upon the decision of the court quashing the affidavit and information.

The motion to quash both the affidavit and information was sustained upon the ground that the affidavit did not contain the names of the witnesses by whom the offence charged in it could be proven.

The fifth clause of section 106 of the criminal code of 1881, Acts 1881, p. 134, provides that, "Whenever, either in term or vacation, any competent and reputable person has knowledge of the commission of any misdemeanor, not within the exclusive jurisdiction of a justice of the peace, he may make an affidavit before any person authorized to administer oaths, setting forth the offence, and the person charged, in plain and concise language, together with the names of the witnesses, and file the same with the clerk, who shall thereupon notify the prosecuting attorney thereof. The prosecuting attorney shall at once prepare and file an information, in term or vacation, in every case against the person charged in said affidavit."

On behalf of the appellee, it is contended that the plain meaning of this clause is, that the names of the witnesses must be inserted in the body of the affidavit to be filed with the clerk, and that thereby the names of the witnesses are made

a material part of the affidavit, necessary to support an information filed upon it.

The construction contended for might be given to the clause in question, without doing violence to the literal meaning of the language used by it, but we can not agree that such a construction ought to be given to the clause when considered with reference to other provisions of the criminal code, and the long established practice in this State in criminal proceedings.

In the first place, whatever it is material to allege in the affidavit to be filed with the clerk, like the allegations of an indictment or information, must be proved at the trial before the party charged can be convicted.

In the next place, the names of the witnesses do not constitute any part of the description of, or an ingredient in, any crime defined by or punishable under the laws of this State.

If, therefore, the construction contended for by counsel for the appellee should be adopted, the prosecuting attorney would be required to prove at the trial matters which were neither jurisdictional in their character nor an element in the crime charged in the affidavit, a result unsupported by any of the analogies in criminal prosecutions, and inconsistent with the general scope and spirit of the code of criminal procedure.

The information may contain more than is averred in the affidavit, but it must not omit any material matter embraced in the affidavit. Moore's Criminal Law, section 135. An information will not be quashed when there is sufficient matter alleged to indicate the crime and the person charged. Acts 1881, p. 148, section 181. Applying that rule to the affidavit filed in this case, we see no objection to its sufficiency in any material respect. It set forth the offence, and person charged, in plain and concise language, and that was all that was necessary to sustain the information based upon it.

When, under the criminal code of 1852, an affidavit was filed with the clerk, or deposited with the prosecuting attorney, to be used as the foundation for an information, the names of the witnesses had also to be furnished. 2 R. S. 1876, p. 377,

section 22. This was evidently to enable the prosecuting attorney to endorse the names of the witnesses on the information, as the prosecuting attorney could not get a continuance on account of the absence of a witness, unless his name was endorsed on the information.

When, therefore, the criminal code of 1881 was enacted, it was, and for many years had been, the practice to require the person making an affidavit for an information, to furnish with the affidavit the names of the witnesses by whom it was expected the offence could be proved.

The provision of the code of 1852, thus requiring the names of the witnesses to be furnished, was, however, directory merely, as the prosecuting attorney was at liberty to obtain the names of witnesses from any other available source, and endorse them on the information. See sections 18, 27, 28 and 88 of the criminal code of 1852. Section 98 of the code of 1881 provides that when an indictment is returned into court, the names of all the material witnesses must be endorsed upon it, but permits other witnesses to be afterwards subpœnaed by the State; the only difference between the two classes of witnesses being that a continuance can not be granted on account of the absence of a witness whose name was not endorsed on the indictment when it was presented by the grand jury. This provision of the code is alike applicable to prosecutions upon information as the series of sections to which it belongs has reference to informations as well as indictments.

We, therefore, construe the fifth clause of section 106 of the code of 1881, set out as above in this opinion, as meaning that, when a person having knowledge of the commission of a misdemeanor makes an affidavit setting forth the offence and the person charged, he is required at the same time to furnish the names of the witnesses by whom he has reason to believe the offence can be proven, and that he may do this by inserting the names of the witnesses in the affidavit, by endorsing their names on the affidavit, or by causing a list of such names, to be made in some other appropriate way, to be

filed with the affidavit, regarding the provision as to the names of witnesses as being directory only, and as not comprising the only method by which the prosecuting attorney may obtain the names of witnesses for the State.

Thus construing the clause of the statute under consideration, we are necessarily brought to the conclusion that the court below erred in quashing the affidavit, as well as the information.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

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No. 8444.

Cronkhite v. Nebeker et al.

Promissory Note.—*Material Alteration.*—*Inserting Name of Bank.*—*Bona Fide Purchaser.*—The maker of a promissory note, perfect in its terms, not negotiable by the law merchant, does not, by leaving a blank space in the body of the note, wherein words of negotiability may be so inserted as not to furnish an indication of the alteration, give an implied authority to the payee to insert therein the name of a bank; and such an insertion, without the authority of the maker, is such a material alteration of the note as will invalidate it in the hands of a *bona fide* purchaser, whether he has notice of the alteration or not.

Same.—*Sale and Purchase of.*—*Purchaser Put upon Enquiry.*—The purchaser of a note, whether negotiable by the law merchant or not, is put upon enquiry as to its genuineness in all its material parts, by the mere fact that it is offered for sale; and if he omits to make enquiry of the maker, he buys at his own risk, and upon the faith of his immediate endorser, or of others, if any, to whom he may legally have recourse.

From the Warren Circuit Court.

W. P. Rhodes and *A. R. Owen*, for appellant.

L. Nebeker and *S. M. Cambern*, for appellees.

Woods, J.—The appellant denied under oath the execution of the note upon which the appellees obtained judgment

against him. There is no dispute in reference to the facts proved at the trial, and the question for decision is whether the finding of the court was right.

The appellant, who was at the time a man of intelligence and able to read both written and printed matter with ease, executed a promissory note of the tenor following, which he did then and there read, to wit:

"$75. September 6th, 1877. Twelve months after date, I promise to pay to the order of G. H. Fitzmaurice, at Covington, Indiana, seventy-five dollars, value received, without any relief from valuation or appraisement laws, with interest at ten per cent. per annum from date, and ten per cent. attorney's fees. The drawers and indorsers severally waive presentment for payment, protest and notice of protest and nonpayment of this note.

[Signed] "LEVI A. CRONKHITE."

The note was prepared by the payee upon an ordinary printed blank, which was so arranged that there was one line in the blank in which there was no printed word except the word "at" printed at the left hand end of the line, and beginning about the middle of said line there were written the words "Covington, Ind.," leaving a space sufficient between the word "at" and the word "Covington," to insert the words "The Farmers Bank" in a handwriting corresponding with the written parts of the note.

At the time of making the note, the appellant objected to its being made payable at a bank, and thereupon the words "Covington, Ind.," were written in by the payee, who filled up the written parts of the instrument with pen and ink which he carried with him. After the execution of the note by the appellant, and without his knowledge or consent, Fitzmaurice inserted the words "The Farmers Bank" before the word "Covington," in such a manner as to afford no indication of an alteration of the note after its execution, and in that condition endorsed it before maturity to the appellees who paid value therefor, without notice or intimation of the alteration.

In support of the decision of the circuit court the following cases are cited: *Marshall* v. *Drescher*, 68 Ind. 359; *Gothrupt* v. *Williamson*, 61 Ind. 599; *Cornell* v. *Nebeker*, 58 Ind. 425; *Spitler* v. *James*, 32 Ind. 202. In these cases the following are referred to: *Hereth* v. *The Merchants' Nat'l Bank*, 34 Ind. 380; *Nebeker* v. *Cutsinger*, 48 Ind. 436; *Riley* v. *Schawacker*, 50 Ind. 592; *Steele* v. *Moore*, 54 Ind. 52; *Woollen* v. *Ulrich*, 64 Ind. 120; *Noll* v. *Smith*, 64 Ind. 511; *Gerrard* v. *Hadden*, 67 Pa. St. 8; *Zimmerman* v. *Rote*, 75 Pa. St. 188; *Chapman* v. *Rose*, 56 N. Y. 137; *Redich* v. *Doll*, 54 N. Y. 234.

In *Gillaspie* v. *Kelley*, 41 Ind. 158, the note read when executed, "payable at —— Bank, at Frankfort." The alteration consisted in filling the blank so as to designate a particular bank. It was held that the holder of the note had implied authority to fill the blank in that way. The following extracts from the opinion in that case are pertinent to the present discussion:

"The insertion of the name of the bank in Frankfort, where the same was payable, was a material alteration, and rendered the note void unless the payee was authorized to fill the blank by inserting the name of the bank. *Woodworth* v. *Bank of America*, 19 Johns. 391; *Clute* v. *Small*, 17 Wend. 238; *Nazro* v. *Fuller*, 24 Wend. 374.

"We proceed to inquire whether the payee of a negotiable promissory note is authorized to insert the name of the bank where the same has been left blank.

"The maker of a promissory note stands upon the footing of an acceptor of a bill of exchange. *Nazro* v. *Fuller*, 24 Wend. 374; Chitty Bills, 100–103; Byles Bills, 173–177.

"In our opinion, the rule is well settled, that if a person indorses or signs in blank paper or a note and intrusts it to another that he may raise money upon it, he authorizes that other person to fill all blanks which are necessary and proper to make the instrument a perfect and complete bill of exchange or promissory note, as the case may be. *Holland* v. *Hatch*,

11 Ind. 497; *Spitler* v. *James*, 32 Ind. 202, and the authorities there cited. It is quite obvious to us, not only from the face of the note, but from the evidence of the appellee, that the maker of the note in question intended to make the same negotiable and governed by the law merchant. If the parties had intended to make an ordinary promissory note, and it had been complete as such when it was delivered to the payee, such payee would not have been authorized to insert words rendering it negotiable; and if there had been no blank in the note, and such words had been interlined, such interlineation would have put a purchaser upon inquiry. The note, when delivered, was not perfect and complete as a negotiable instrument governed by the law merchant. The payee had the right to make it perfect and complete by inserting the name of the bank where it was to be payable."

The case in the record before us is in some respects essentially different. The note as executed was a perfect non-negotiable note. No words were wanting in order to give full force and effect to the words present. It was just as the maker intended it should be. It was prepared upon a printed form, and the words inserted did not fill the entire blank space, but left it possible to make an insertion of other words, which were wrongfully inserted, and when inserted made the note appear to be negotiable by the law merchant. If the word "Covington" had been written close to the word "at," the words "at the Farmers' Bank" might have been inserted after the words "Covington, Ind.," and so the same alteration in the character of the instrument would have been equally well accomplished.

The exact question presented in this record is, whether the maker of a non-negotiable promissory note, perfect in its terms, by leaving a blank space in the body of the note wherein words of negotiability may be so inserted as not to furnish an indication of the alteration having been made irregularly, gives an implied authority for the making of the alteration, which, as against a *bona fide* purchaser, he may not deny.

The case of *Marshall* v. *Drescher*, 68 Ind. 359, was essen-

tially the same in its facts, and was decided upon the same ground as *Gillaspie* v. *Kelley, supra.* The cases of *Cornell* v. *Nebeker*, 58 Ind. 425, *Gothrupt* v. *Williamson*, 61 Ind. 599, and other decisions of this court referred to in these cases, all arose upon facts quite distinguishable from those now before us.

In the case of *Holmes* v. *Trumper*, 22 Mich. 427, S. C. 7 Am. R. 661, upon a state of facts not essentially unlike those shown in *Gillaspie* v. *Kelley* and *Marshall* v. *Drescher, supra*, is a vigorous discussion of the principle involved.

We give the following extracts from the opinion in that case, which received the unanimous concurrence of the judges:

"We think the courts have gone quite far enough in sustaining instruments executed in blank, and the implied authority to fill them up, and we are not disposed to take a step in advance in that direction. * * *

"The general principle that 'where one of two innocent parties must suffer,' etc., upon which the plaintiff in error relies, as stated by us in *Burson* v. *Huntington*, 21 Mich. 415, is one which, in its application, is mainly confined to cases where the third person, whose act or default has occasioned the loss, has been in some sense or to some extent, the agent of the party who is made to sustain the loss, or when the latter, by his acts or negligence, has authorized the other party to consider him as such; and in all the cases (unless this is an exception) where, upon the general principle relied upon, a party has been held liable upon a written contract on the ground of negligence alone, without reference to such agency, he has only been held liable upon it in the shape in which he allowed it to go from his hands, and not as criminally altered by another. * * As between the maker of commercial paper, and an innocent party acting upon the faith of the paper, which the maker has voluntarily and intentionally executed and even negligently allowed to go out of his hands and to get into circulation, the general principle we are discussing would preclude such maker from showing that the paper was not intended to have the effect which its appearance indicated,

though, as between the original parties, many things might be shown to defeat it. It is substantially a representation upon which he has authorized innocent parties to act; and when they have thus acted he must be held by the contract indicated by the representation thus made.

"But this reasoning extends only to the paper as made by him, or as he has thereby authorized some other person to change its terms; and the note in this case being a complete legal instrument when issued, to hold him bound by the contract, as altered by the forgery, involves the idea that the person committing the forgery was his agent in committing it (a ludicrous absurdity), or at least that he had authorized innocent third parties so to treat him. * * The argument amounts simply to this: That by the maker's awkwardness or negligence his note was issued by him in a shape which rendered it somewhat easier for another person to commit a crime than if he had taken the precaution to erase the word 'at,' and to draw a line through the blank which followed it; and that a forgery committed by filling this blank would be less likely to excite suspicion than if committed in some other way.

"But how such a crime, whether committed in this or in any other way, could create a contract on the part of the maker, we confess ourselves unable to comprehend; nor are we satisfied that a forgery committed in this way would be any less liable to detection than if committed in many other ways. The negligence, if such it can be called, is of the same kind as might be claimed if any man, in signing a contract, were to place his name far enough below the instrument to permit another line to be written above his name in apparent harmony with the rest of the instrument; or, as if the instrument were written with ink, the material of which would admit of easy and complete obliteration or fading out by some chemical application which would not affect the face of the paper, or by failing to fill any blank at the end of any line which might happen to end far enough from the side of the page to

admit the insertion of a word. The law has no scale by which to measure the various degrees of facility with which different modes of forgery may be committed, or their liability to suspicion or detection; and we see no clear and intelligible distinction by which we could hold the maker in this case bound by this forgery, which would not hold all persons liable for the alteration and forgery of any paper signed by them. Whenever a party in good faith signs a complete promissory note, however awkwardly drawn, he should, we think, be equally protected from its alteration by forgery in whatever mode it may be accomplished; and unless, perhaps, where it has been committed by some one in whom he has authorized others to place confidence as acting for him, he has quite as good a right to rest upon the presumption that it will not be criminally altered, as any person has to take the paper on the presumption that it has not been; and the parties taking such paper must be considered as taking it upon their own risk, so far as the question of forgery is concerned, and as trusting to the character and credit of those from whom they receive it, and of the intermediate holders.

"If promissory notes were only given by first-class business men who are skilful in drawing them up in the best possible manner to prevent forgery, it might be well to adopt the high standard of accuracy and perfection which the argument in behalf of the plaintiff in error would require. But for the great mass of the people who are not thus skilful, nor in the habit of frequently drawing or executing such paper, such a standard would be altogether too high, and would place the great majority of men, of even fair education and competency for business, at the mercy of knaves, and tend to encourage forgery by the protection it would give to forged paper."

This reasoning is in entire accord with the propositions quoted from the opinion in *Gillaspie* v. *Kelley, supra.* To the same effect, see *Worrell* v. *Gheen*, 39 Pa. St. 388; *Goodman* v. *Eastman*, 4 N. H. 455; *Bruce* v. *Westcott*, 3 Barb. 374;

Washington Savings Bank v. *Ecky*, 51 Mo. 272; *Ivory* v. *Michael*, 33 Mo. 398; *Presbury* v. *Michael*, 33 Mo. 542; *Wade* v. *Withington*, 1 Allen, 561; *Fay* v. *Smith*, 1 Allen, 477; *Draper* v. *Wood*, 112 Mass. 315; *Wood* v. *Steele*, 6 Wal. 80; *Lisle* v. *Rogers*, 18 B. Mon. 528; *McGrath* v. *Clark*, 56 N. Y. 34; *Hert* v. *Oehler*, 80 Ind. 83. See also *Cline* v. *Guthrie*, 42 Ind. 227.

In *McGrath* v. *Clark*, *supra*, which is fully in point, and, in its facts, is even a stronger case than the one before us, it is said by CHURCH, C. J., who delivered the opinion of the court: "The rule that 'whenever one of two innocent parties must suffer,' * * is not applicable for the reason that the endorser did not, in any legal sense, *enable* the maker to make the alteration;" and in *Wood* v. *Steele*, *supra*, it is said, to the same point: "The defendant could no more have prevented the alteration than he could have prevented a complete fabrication; and he had as little reason to anticipate one as the other."

There are cases in actual, and in seeming, conflict with the foregoing; but they are, in most instances, cases where the notes, as executed, were imperfect, the unfilled blanks being in such connection with the words used as to require the insertion of other words in order to complete the instrument as executed; or they turn upon a misapplication of the maxim that "If one of two innocent persons must suffer," etc.; as if any man could, or was bound to endeavor to, protect the world against the commission of forgeries upon his obligations. If he owes the public any duty whatever, in this respect, the measure of that duty must be the utmost care which, in each case, can reasonably be employed; and the inquiry in each case of unauthorized alteration will be, not whether the party sought to be charged made the obligation, but whether he might, by greater care, have so constructed the instrument which he did execute, as that an alteration of it would have been impossible or more difficult. Such a doctrine, instead of giving stability and credit to commercial paper, would lead

to uncertainties quite inconsistent with the character which such paper ought; and is generally supposed, to bear. Besides, if the maxim referred to can apply at all, it applies as well to non-commercial as to commercial paper, and, to be consistent, we should be driven to hold that the maker of a note not payable in bank is estopped as against an innocent purchaser, from pleading an alteration made by filling blank spaces carelessly left at the time the paper was issued.

The simple and fair rule for all is, that the purchaser of paper, whether negotiable by the law merchant or not, is put upon inquiry as to the genuineness of the paper in all its material parts, by the mere fact that it is offered for sale; and if he sees fit to omit making inquiry of the maker, he buys at his own risk and upon the faith of his immediate endorser, or other parties, if any, against whom he may have recourse.

The judgment is reversed, with costs, and with instructions to grant the appellant a new trial.

81	327
187	571
138	400
81	327
168	642

No. 8628.

McComas v. Krug.

Constitutional Law.—*Construction of Statutes.—Legislative Power.—Supreme Court.*—The legislative authority of the State is vested in the General Assembly whose power is supreme and sovereign, and is subject to no restrictions except such as are imposed by the State and Federal constitutions, and the laws and treaties made by and under the Federal Government; and, in considering the constitutionality of an act of the General Assembly, it is the uniform rule of the Supreme Court to construe and interpret its provisions, if it can be done, in such manner as to sustain and not defeat the law in question.

Same.—*Impeachment or Removal of Public Officers.—Voluntary or Habitual Intoxication.*—Sections 7 and 8, of article 6, of the State constitution, should be construed together, and, thus construed, they authorize the General Assembly to provide by law for the impeachment or removal from office of county, township or town officers, for crime, incapacity or negligence.

Therefore, the act of March 11th, 1875 (section 6012, R. S. 1881), providing for the removal from office of any public officer, for voluntary intoxication in the business hours of his office, or for habitual intoxication, is not repugnant to, or in conflict with, any provision of the constitution, State or Federal, and is a constitutional and valid law.

From the Montgomery Circuit Court.

J. Wright, J. M. Sellers and *T. E. Ballard*, for appellant.

G. W. Paul, J. E. Humphries and *E. C. Snyder*, for appellee.

HOWK, J.—In this case, the appellee, the defendant below demurred separately to each of the first, second and third paragraphs of the appellant's complaint, upon the grounds that it did not state facts sufficient to constitute a cause of action; that the State of Indiana was a necessary party plaintiff, and that appellant had not the legal capacity to sue herein. These demurrers were severally sustained by the court, and to each of these rulings the appellant excepted. He refused to amend or plead further, and judgment was rendered against him for the appellee's costs.

Errors are assigned by the appellant, in this court, which call in question the decisions of the circuit court in sustaining demurrers to each of the paragraphs of his complaint.

In the first paragraph of his complaint, the appellant alleged in substance, that he was a citizen and resident of the county of Montgomery, and State of Indiana; that the appellee, William J. Krug, was on the — day of October, A. D. 1878, elected to the office of sheriff of the county of Montgomery, and State of Indiana; that, on or about the — day of August, 1879, the appellee executed his bond as required by law and took the oath of office, as sheriff of said Montgomery county; that he took possession of said office and entered upon his duties as such sheriff; that he was in the full possession thereof, and had been and then was holding the said office of sheriff of said county, and receiving the profits and emoluments of such office; and that, on or about the 25th day of September, 1879, during the business hours of his said office, the appellee voluntarily became intoxicated, thereby for-

feiting his right to the said office of sheriff. Wherefore the appellant demanded, that the said office be declared forfeited as to the appellee and vacant, and for all proper relief.

The second paragraph of the complaint differs from the first paragraph only in this, that, instead of alleging a specfic act of voluntary intoxication as in the first paragraph, the appellant alleged in substance, in the second paragraph, that the appellee was in the habit of voluntarily becoming intoxicated, by the use of intoxicating liquors, during his continuance in office, thereby forfeiting his right to hold said office.

The third paragraph of the complaint differs from the first paragraph only in this, that the specific act of voluntary intoxication was alleged, in the third paragraph, to have been on or about the 4th day of November, 1879, instead of on or about the 25th day of September, 1879, as alleged in the first paragraph. Substantially the same relief was demanded in each of the second and third paragraphs, as was demanded in the first paragraph of the appellant's complaint.

It is manifest, that, in each of the paragraphs of his complaint, the appellant intended and attempted to state a cause of action against the appellee, under the provisions of an act of the General Assembly of this State, approved March 11th, 1875, entitled "An act to provide against intoxication, on the part of public officers, and providing for the removal of officers therefor." Omitting the enacting clause, this act provided, as follows:

"That any person holding any office under the constitution or laws of this State, who shall voluntarily become intoxicated within the business hours of his office, or shall be in the habit of becoming intoxicated by the use of intoxicating liquors, shall forfeit his office and be removed therefrom, upon complaint filed in the circuit court of the county in which he resides, by any citizen of this State, alleging that he is a citizen of the State of Indiana, and giving the name of the person complained of, and designating the office which he holds, and that such officer has voluntarily become intoxicated within

the business hours of his office, or shall be in the habit of becoming intoxicated by the use of intoxicating liquors during his continuance in office. The clerk of said court shall docket said cause for trial and issue summons for the defendant, as in other causes. If, upon the trial of said complaint either by the court or a jury, it shall be found that the facts stated in the complaint are true, such officer shall be adjudged to have forfeited his office, and the office be adjudged vacant." 2 R. S. 1876, p. 477; Acts of 1875, Reg. Sess., p. 91; Section 6012, R. S. 1881.

It will be readily seen, we think, that the appellant has brought his cause of action, as stated in each of the paragraphs of his complaint, the substance of which we have given, squarely within the provisions of the statute above quoted. If the statute is a constitutional and valid enactment, then each of the paragraphs of the complaint stated facts sufficient to constitute a cause of action, and the demurrers thereto ought to have been overruled. If, however, the statute quoted is unconstitutional and void, then the several rulings of the circuit court, on the demurrers to the complaint, were right and the judgment below must be affirmed. The constitutionality or unconstitutionality of the statute is the only question discussed by the counsel of the respective parties, in their able and exhaustive briefs of this cause, and the only question this court is required to consider and decide. As here presented, it is purely a question of law, and not of ethics, or of good or bad morals.

The office of sheriff is a constitutional office; that is, it is an office provided for in the constitution of this State, of 1851. Thus, in section 2 of article 6 of the constitution, it is provided that "There shall be elected in each county, by the voters thereof, at the time of holding general elections," among other officers, a sheriff, who should "continue in office two years," and should not be eligible to the office "more than four years in any period of six years." Section 4 of article 6 of the constitution of 1851 provides in relation to county officers, such

as sheriff, as follows: "No person shall be elected or appointed as a county officer who shall not be an elector of the county; nor any one who shall not have been an inhabitant thereof during one year next preceding his appointment," etc. It is claimed by appellee's counsel, as we understand their argument, that this section 4 of article 6 prescribes the constitutional qualifications of the person who is eligible to the office of sheriff, and only requires that he be an elector of the county, and shall have been an inhabitant thereof during one year next preceding his election; and that the Legislature has no power to declare that such person must possess other qualifications, in addition to those prescribed in the constitution. It is further claimed that, by the statute quoted, the Legislature has added to the constitutional qualifications of one eligible to the office of sheriff, "temperance, morality, sobriety and that such officer shall not drink intoxicating liquors during office hours." For these reasons, the appellee's counsel earnestly insist that the statute under consideration is unconstitutional and wholly void.

It may be premised, in the examination of the question before us, that, in the first section of the fourth article of the constitution of 1851, it was declared that "The legislative authority of the State shall be vested in the General Assembly, which shall consist of a senate and a house of representatives." Of this constitutional provision, as the same appeared in the same language, in the constitution of 1816, in *Beauchamp* v. *The State*, 6 Blackf. 299, it was said by DEWEY, J., speaking for the court: "This is not a grant of special, limited, and enumerated powers, implying a negative of all others, as is the case with the constitution of the United States. The legislative authority of this State is the right to exercise supreme and sovereign power, subject to no restrictions except those imposed by our own constitution, by the Federal constitution, and by the laws and treaties made under it. This is the power under which the Legislature passes all laws." It can not be said that the statute quoted is in conflict with the

Federal constitution, or with any law or treaty made under that constitution. Does the statute infringe upon, or is it repugnant to, any of the provisions of the constitution of this State? In *Fletcher* v. *Peck*, 6 Cranch, 87, in considering the constitutionality of a statute of Georgia, under the constitution of that State, it was said by MARSHALL, C. J., on page 128: "The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

So, in *Maize* v. *The State*, 4 Ind. 342, in considering a similar question, STUART, J., speaking for the court, said: "Such questions are always regarded by the courts as of serious importance. The judiciary look to the acts of the Legislature with great respect, and reconcile and sustain them, if possible. The General Assembly is the immediate exponent of the popular will,—expressly delegated to clothe that will with the forms of law. The presumption that such a body has sanctioned enactments in violation of the constitution, is not to be lightly indulged. That the act is imperfect or impolitic, is not enough. These defects subsequent legislation can remove by amendment or repeal. To bring its validity within the control of the courts, it must be clearly subversive of the constitution."

It has been the uniform rule in this court, when the constitutionality of a statute has been under consideration, to so construe and interpret its provisions, if possible, as to sustain and not defeat the law in question. For it is clearly the duty

of the court, when the constitutionality of a statute is merely doubtful, to sustain the law, if it can be done by any fair construction. *Stocking* v. *The State*, 7 Ind. 326; *Brown* v. *Buzan*, 24 Ind. 194; *Shoemaker* v. *Smith*, 37 Ind. 122; *Clare* v. *The State*, 68 Ind. 17; *Fry* v. *The State*, 63 Ind. 552, on page 559.

With this statement of the rule which governs the court in the determination of such a question as the one now before us, we proceed now to the consideration of the constitutionality of the statute above quoted. In section 7 of the sixth article of the constitution of 1851, it is provided as follows: "All State officers shall, for crime, incapacity, or negligence, be liable to be removed from office, either by impeachment by the house of representatives, to be tried by the senate, or by a joint resolution of the General Assembly; two-thirds of the members elected to each branch voting, in either case, therefor." The next succeeding section of the same article of the same constitution, reads as follows:

"Sec. 8. All State, county, township, and town officers may be impeached, or removed from office, in such manner as may be prescribed by law."

It would seem that these two sections of the constitution were intended, and ought, to be construed together. They both treat of the same general subject, namely, impeachment or removal from office. Construed together, sections 7 and 8 would provide, as to State officers, that for crime, incapacity, or negligence, they should be removed from office, either by impeachment by the house and trial by the senate, or by a joint resolution of the General Assembly, or in such manner as might be prescribed by law; and, as to county, township and town officers, the same sections of the constitution, construed together, would provide that for crime, incapacity, or negligence, they should be impeached, or removed from office in such manner as might be prescribed by law. Thus construing together these two sections, 7 and 8 of the sixth article of the constitution of 1851, we have no difficulty in declaring that the statute above quoted is a constitutional and

valid law. It does not infringe upon, nor is it in conflict with any of the provisions of the constitution. Not only so, but we think that the Legislature were authorized, under the provisions of said sections 7 and 8, of article 6, of the constitution, construed together, to prescribe and declare by law that for such incapacity as necessarily results from voluntary intoxication within the business hours of his office, or from the habit of becoming intoxicated by the use of intoxicating liquors, a county officer, such as a sheriff, shall forfeit his office and be removed therefrom. This is what, by fair construction, the Legislature have declared in and by the statute now under consideration. True, the word "incapacity" is not to be found in the statute; but it is equally true, that it proceeds, and can only be sustained, upon the theory that voluntary intoxication during business hours, or the habit of becoming intoxicated by the use of intoxicating liquors, will incapacitate the county officer and render him unfit for the proper discharge of his official duties.

It is claimed by the appellant's counsel that the word "eligible," as used in the State constitution, "relates to capacity of holding, as well as capacity of being elected to, an office;" and so this court decided in *Carson* v. *McPhetridge*, 15 Ind. 327. But it will not do to say, we think, that because a man is eligible to a county office, as well for the purpose of holding the same as for the purpose of being elected thereto, and because the constitutional term of his office is two years, he may not disqualify himself within his term of two years by crime, incapacity, or negligence, for the proper discharge of the duties of his office. If he may so disqualify himself, and surely this can not be doubted, it would be strange, indeed, if the Legislature might not declare by law, that for such crime, such incapacity, or such negligence, such county officer might be impeached or removed from his office. It would be stranger still, as it seems to us, if such a law for such a purpose should be declared unconstitutional and void, either because it added to the constitutional quali-

fications of a county officer, or because it might have the effect of abridging his term of office, as fixed by the constitution.

For the reasons given, we are of the opinion, that the statute quoted is a constitutional and valid law; and that, therefore, the appellee's demurrers to each of the paragraphs of the complaint, for the alleged insufficiency of the facts therein, ought to have been overruled. The other grounds of demurrer have not been discussed, and might be regarded as waived; but we may say, that it does not seem to us, that either of these grounds of demurrer was well assigned. Under the provisions of the statute, the action was properly brought by the appellant in his own name, and the State of Indiana was neither a necessary nor a proper party to the suit.

The judgment is reversed, at the appellee's costs, and the cause is remanded, with instructions to overrule the demurrers to each of the paragraphs of complaint, and for further proceedings not inconsistent with this opinion.

No. 9216.

Morrison et al. v. The Bank of Commerce.

Taxes.—*Complaint to Enjoin Execution of Deed for Land Sold.*—A complaint to enjoin a city treasurer from executing a deed for real estate sold for taxes, which avers that the owner of the property, at the time of the sale, had sufficient personal property in the county out of which the tax could have been collected, is good on demurrer.

Same.—*Sale of Real Estate, When Owner has Personal Property.*—A sale of real estate for taxes, while the owner has sufficient personal property out of which the taxes could have been satisfied, is void.

Same.—*Agreement to Bid Jointly at Tax Sale.—Public Policy.*—An agreement made between two or more persons to bid jointly upon property at a tax sale, if not made to prevent bidding, for the purpose of protecting their own interests, is not fraudulent in law, and will not vitiate such sale.

SAME.—*Judgment Lien-Holders May Purchase.*—When one holds a judgment lien upon real property offered for sale for taxes, he has the right to pay the taxes, but this right does not impose upon him the duty to pay them, nor does it prevent him from acquiring title to such property by purchase at such tax sale.

From the Marion Superior Court.

S. Claypool, H. C. Newcomb, W. A. Ketcham and *J. T. Lecklider*, for appellants.

J. M. Judah and *A. S. Caldwell*, for appellee.

BEST, C.—The appellee brought this action against William H. Morrison and several other persons, partners under the firm name of the "Indiana Banking Company," William M. Wiles, treasurer, and Benjamin C. Wright, clerk of the city of Indianapolis, and Daniel W. Grubbs, to quiet the title to some real estate, to set aside a sale of the same for taxes and to restrain the officers of said city from executing a deed to the purchasers in pursuance of such sale.

The complaint averred in substance that the appellee is a corporation, and that it owns lots 1 and 2 in square 46 in the city of Indianapolis, Marion county, Indiana; that on the 17th day of February, 1877, one Nicholas R. Ruckle, from whom the appellee derived its title, owned said lots, and on said day the treasurer of the city of Indianapolis sold said lots to Daniel W. Grubbs and Thomas Cottrell for $3,374.95, which was the amount of taxes due thereon, and issued to them a certificate of sale; that afterwards said Cottrell assigned his interest in said certificate, which was one-half, to one Francis M. Churchman, who afterwards assigned it to the appellee; that, at the time and before such sale, said Nicholas R. Ruckle was a resident and citizen of Indianapolis, Marion county, Indiana, and had sufficient personal property out of which said taxes could have been collected; that at said sale said Daniel W. Grubbs and Thomas Cottrell each proposed to and intended to be competing bidders on such property, but for the purpose of preventing competition at such sale, and to enable each to purchase for one-half of said tax more of said property than they

otherwise could do, they secretly and corruptly combined, conspired and agreed not to bid against each other, nor to bid separately for any part of said property, but agreed to bid the whole off together, which they did in pursuance of said agreement; that said Grubbs was acting for the Indiana Banking Company, and that said company claims to be the equitable owner of one-half of said certificate; that the appellee, on the 8th and 12th days of February, 1879, tendered to the Indiana Banking Company, to Daniel Grubbs and to the treasurer of the city of Indianapolis, $1,900 in redemption of one-half of said certificate, but that each refused to receive said money, and the appellee now brings the same into court for such of the parties as may be entitled to the same; that said Indiana Banking Company and said Grubbs are claiming title to said property by virtue of said certificate, are threatening to procure a deed for the same, and the treasurer and the clerk of said city are threatening to execute a deed for said property, which they will do unless restrained. Wherefore, etc.

A demurrer to the complaint for want of facts was overruled.

The Indiana Banking Company and Daniel W. Grubbs then filed an answer of two paragraphs.

The second paragraph admitted the purchase of the property at the price named, and then proceeded as follows: "But they deny the combination as charged between said Grubbs and said Cottrell, and they deny that said Grubbs and said Cottrell were prepared to, or intended to bid on said real estate as competing bidders, but on the contrary these defendants, except said Grubbs, were at the time of said tax sale judgment creditors of said Nicholas R. Ruckle, and had a lien as such creditors on said real estate by virtue of their said judgment, which judgment was recovered in the superior court of said Marion county, Indiana, on the 12th day of September, 1876, for the sum of $1,065 and costs of suit, and which judgment is still unsatisfied; and said Grubbs was

employed by the other defendants answering herein, to attend said tax sale and bid off said real estate, or so much thereof as might be sold to pay the taxes delinquent thereon and the legal costs and charges for the protection of the judgment lien of these said defendants; or to so bid, in conjunction with other creditors of the said Ruckle, who might choose to join in such purchase, as to prevent an adverse lien from attaching to said property by reason of such sale. And said Cottrell, in making said purchase with said Grubbs, was acting as the agent of Francis M. Churchman, who was also a judgment creditor of said Ruckle, and for the purpose of protecting the interest of their said principals, said Grubbs and Cottrell agreed to bid on said property jointly for the joint benefit of their said principals and not otherwise. Wherefore defendants say there was no illegal combination, fraud or wrong on the part of said Grubbs and Cottrell in making said purchase."

It is further averred that said Grubbs purchased said property as the agent of the persons composing the Indiana Banking Company, and that he did not then nor has he now any interest in said certificate, but the same belongs to said company. All other averments in the complaint are denied.

A demurrer for want of facts was sustained to both paragraphs of the answer, and, the defendants declining to further plead, final judgment was rendered against them.

The assignments of error question the rulings of the court in overruling the demurrer to the complaint, and in sustaining the demurrer to the second paragraph of the answer.

The only objection urged to the complaint is that it does not state facts sufficient to authorize an injunction. If it stated facts entitling the party to any relief, it was sufficient upon demurrer. *Searle* v. *Whipperman*, 79 Ind. 424.

The facts averred showed that the sale was void. *McWhinney* v. *Brinker*, 64 Ind. 360. Aside from the unlawful combination among bidders as averred, it was alleged that there was plenty of personal property out of which the taxes could

have been collected, and a sale, under these circumstances, is illegal and void. *Abbott* v. *Edgerton*, 53 Ind. 196; *Ward* v. *Montgomery*, 57 Ind. 276; *Smith* v. *Kyler*, 74 Ind. 575.

The complaint was sufficient, and the demurrer properly overruled.

The remaining question is as to the sufficiency of the second paragraph of the answer. The complaint averred that the property was purchased in pursuance of an unlawful agreement made between the purchasers, whereby competition among bidders was prevented. The answer denied that the purchasers intended to bid separately upon the property, and then averred that the principal of each of them had a judgment lien upon the property; that said purchasers, for the purpose of protecting such liens, and of preventing an adverse lien from attaching to the property, agreed to jointly bid off said property for the benefit of their principals, and for no other purpose.

The law is well settled, that any arrangement entered into between persons to prevent competition among bidders at an auction sale is a fraud upon the owner of the property, and will vitiate any sale affected by it. Freeman Ex., sec. 297; *Dudley* v. *Little*, 2 Ohio, 504; *Hunt* v. *Elliott*, 80 Ind. 245.

It is equally well settled, that two or more persons may unite in bidding off property, if their purpose in so doing is not to prevent competition among bidders, but is for an honest and lawful purpose. *Hunt* v. *Elliott*, *supra*; *Phippen* v. *Stickney*, 3 Met. 384.

In the case last above cited, it was said: "That where such arrangement is made for the purpose and with the view of preventing fair competition, and by reason of want of bidders to depress the price of the article, offered for sale, below the fair market value, it will be illegal, and may be avoided as between the parties, as a fraud upon the rights of the vendor. But, on the other hand, if the arrangement is entered into for no such fraudulent purpose, but for the mutual convenience of the parties, as with the view of enabling them to become

purchasers, each being desirous of purchasing a part of the property offered for sale, and not an entire lot, or induced by any other reasonable and honest purpose, such agreement will be valid and binding."

This extract expresses the law correctly upon this subject, and, we think, the averments of the answer bring the purchasers within the rule announced. The agreement of the purchasers to bid upon the property jointly, for the protection of their liens, did not necessarily prevent competition among bidders at the sale, and as it is averred that it was not made for such purpose, it was not an unlawful agreement. It is true that the agreement prevented any competition between these purchasers, but this competition they had the right to control for the protection of their own interests. They were under no obligation to bid against each other, and their omission to do so, whether by agreement or otherwise, if not done for the purpose of preventing competition among bidders, will not impair the validity of such sale.

The appellee, however, insists that if the sale, under the circumstances stated in the answer, was not fraudulent, yet, as the principals of the purchasers were lien-holders, the purchase will enure to the benefit of the estate, and that appellants can not acquire title through such sale. This depends upon the relation the lien-holders sustain to the owner. The principle is universal, that if one person sustains such relation to the owner of property as imposes the duty upon him to pay the taxes, such person can not acquire title to such property by permitting it to be sold for taxes, and becoming himself the purchaser. Burroughs on Taxation, page 355; *Shanklin* v. *Franklin L. Ins. Co.*, 77 Ind. 268.

The lien-holder, however, was under no obligation to pay the taxes, but by statute was authorized to do so, and to collect them in the same manner as the original lien. Section 251, 1 R. S. 1876, p. 127.

The question arises whether the right to pay the taxes precludes the lien-holder from acquiring title to the property at

a tax sale. The appellees insist that such purchasers take the title as trustees and hold it for the benefit of the owner of the fee as well as all creditors. In support of this doctrine they cite *Bouton* v. *Lord*, 10 Ohio St. 453; *Fisk* v. *Brunette*, 30 Wis. 102; *Fair* v. *Brown*, 40 Iowa, 209; *Porter* v. *Lafferty*, 33 Iowa, 254; *Stears* v. *Hollenbeck*, 38 Iowa, 550. In *Porter* v. *Lafferty*, and *Stears* v. *Hollenbeck*, it was the duty of the purchasers to pay the taxes, and for that reason it was held that they could not acquire title to such lands at tax sales. In *Fisk* v. *Brunette*, the purchaser held the legal title as a trustee for the owner, and it was held that he could not acquire title through tax certificates purchased by him as such purchase was for the protection of the title. In *Bouton* v. *Lord*, the question arose between different lien-holders and not between a lien-holder and the owner of the fee. None of the cases thus noticed support the doctrine for which they are cited. In *Fair* v. *Brown*, *supra*, the question arose between a mortgagee and the purchaser, who also held a junior mortgage and some judgments which were prior liens, and it was held that he could not acquire title by his purchase. The court said: "Defendant was authorized to redeem from the tax sale. * * * Equity will not permit him to acquire the title for an inconsiderable sum when he was authorized to remove the trifling incumbrance by redemption. Though not bound to pay the tax, yet it was his right to do so to protect his own liens." This language seems to support the position of the appellees, but we know of no case that holds as between the judgment lien-holder and the owner, that the former may not acquire title to the property at a tax sale, and are not inclined to adopt such rule. We are of opinion that the mere right to pay the taxes imposes no such duty upon the lien-holder, and creates no such relation between him and the owner as to preclude the former from becoming a purchaser at a tax sale. For these reasons we think the second paragraph of the answer was good, and that the court erred in sustaining the demurrer to it.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the general term be and it is hereby reversed at the appellee's costs.

WOODS, J., dissents.

No. 8033.

CARR ET AL. *v.* STATE, EX REL. ATTORNEY GENERAL.

81 342
155 605

SUPREME COURT.—*Assignment of Error.*—Where a complaint consists of more than one paragraph, the sufficiency of a single paragraph thereof can not be questioned for the first time in the Supreme Court.

COUNTY CLERK.—*Official Bond.—Complaint.*—As to the sufficiency on demurrer of the complaint on the bond of a county clerk, to recover for fines, docket and witness fees collected by him, see opinion.

SAME.—*Docket and Witness Fees.—Fines and Forfeitures.—Attorney General.—Prosecuting Attorney.—Statute Construed.*—It is the duty of the clerk—R. S. 1881, section 5858—to pay docket fees to the treasurer within thirty days after collection; also on the first of January, annually, all fines, jury fees, and witness fees not claimed for a year; also the proceeds of sales of real estate of unknown heirs—section 2412; also, when after the lapse of two years from final settlement of an estate, heirs do not claim the surplus, and the court directs the payment—section 2415; and on default the Attorney General may, at once, under section 5668, sue for the same; but for default as to fines and forfeitures, and for property escheating to or belonging to the State, he has no duty to perform until a year has elapsed from the time the cause of action has accrued, and then only if the prosecuting attorney has failed, neglected, or refused to collect or begin suit.

SAME.—*Repeal.—Case Disapproved.*—Section 5668, R. S. 1881, is not so inconsistent with sections 4435, 5611 and 5616, or either of them, as to repeal them. *Moore* v. *State, ex rel.*, 55 Ind. 360, disapproved on this point.

SAME.—*Statute of Limitations.—Principal and Surety.*—In a suit against the county clerk and his sureties, on his bond, it is error to sustain a demurrer to an answer by the clerk, that the cause of action did not accrue within three years, and the error can not be regarded as harmless because there was a similar defence pleaded by the sureties in another paragraph, nor because the judgment against the clerk was no larger than against the sureties; nor can the suit be regarded as upon the bond against the

sureties, and against the clerk as not upon the bond, so as to make the period of limitation, as to him, six years, as provided in section 293, R. S. 1881.

SAME.—*Payment After Suit.—Semble*, that a county clerk, pending a suit on his bond, may pay, as he ought before suit, to the proper officer, and, under proper issues, proof of such payment is admissible; but this would not affect the plaintiff's right to costs and penalties.

From the Henry Circuit Court.

M. E. Forkner, *J. H. Mellett* and *E. H. Bundy*, for appellants.

D. P. Baldwin, Attorney General, *W. W. Thornton* and *W. Grose*, for appellee.

WOODS, J.—Complaint in two paragraphs upon the official bond, as county clerk, of the appellant Carr. The specifications of error assigned are in substance as follows:

1st. The overruling of the demurrer to the first paragraph of the complaint.

2d. That the second paragraph of the complaint does not state facts sufficient to constitute a cause of action.

3d. The sustaining of the demurrer to the second, fifth, seventh, eighth and tenth paragraphs, respectively, of the defendants' answer.

4th. The overruling of the appellants' motions for a new trial, to set aside the report of the referee, to strike out parts of the referee's report, for a more specific bill of particulars with the complaint, and to strike out part of the complaint.

It may be assigned for error in this court that an entire complaint does not state facts sufficient to constitute a cause of action, code of 1852, section 54; Revision of 1881, p. 63, section 343; but it is well settled that such an assignment can not be made in reference to one of several paragraphs of a complaint. *McCallister* v. *Mount*, 73 Ind. 559; *Higgins* v. *Kendall*, 73 Ind. 522; *Trammel* v. *Chipman*, 74 Ind. 474. The question of the sufficiency of the second paragraph of the complaint is, therefore, not presented.

The first and second objections stated in the demurrer to the first paragraph of the complaint are to the effect that, in-

stead of the attorney general, the treasurer or the board of commissioners of the county ought to have been the relator. But it is conceded that the point has been ruled against the appellants in *Moore* v. *The State, ex rel.*, 55 Ind. 360.

It is further insisted that the paragraph does not state facts sufficient; that its averments are confused and unintelligible, and show no default in the clerk; that it is not shown that "the officer whose duty it was to collect the same, had failed, neglected or refused for twelve months after the cause of action in favor of such officer or the State had accrued, to sue for and proceed to collect the same," that is to say, the moneys now sued for, Acts 1873, p. 20, sec. 9; that it is not stated when the several amounts were collected, nor when they should have been paid into the treasury, under the laws on the subject.

The material averments of this paragraph are: That in October, 1872, the defendant Carr was duly elected the clerk of the Henry Circuit Court, and on the 4th day of November, 1872, was commissioned, gave bond, qualified, and entered upon the duties of the office, and from that date until November 4th, 1876, continuously performed the duties thereof, and during the time between said dates, and by virtue of his office, collected large sums of money, to wit: Fines and forfeitures, the sum of $600; court docket fees, $500; unclaimed witness fees, $800; moneys in estates, $500; in the aggregate, $2,400; which he was required by law to pay over to the treasurer of the county, "and for breach of the condition of said bond, which was executed by the other defendants, a copy of which is filed herewith, and made a part hereof, as 'Exhibit A,' promised and agreed that said Carr would faithfully discharge his duties as clerk of said county, and pay over all moneys which would come to his hands by virtue of his said office according to law, and plaintiff says he failed, refused and neglected so to do, and that there is due, owing and unpaid to plaintiff, the aforesaid sum of $2,400, together with interest from the date the same should have been paid; that before the commencement of this suit, to wit, on the 29th day of March,

1877, the plaintiff, by her attorney, demanded of and from said defendants said sums of money, and that payment thereof was by them refused. Wherefore," etc.

The bond is in the usual form, and need not be set out here. Notwithstanding its ill-constructed and imperfect sentences, we think the paragraph states intelligibly a sufficient breach of the bond to make it good on demurrer.

It was the duty of the clerk of a circuit court, within thirty days after collecting the same, to pay to the treasurer of his county all docket fees received by him on account of the business of his court. 1 R. S. 1876, p. 776, section 6.

It was his duty on the 1st day of January of each year, to pay to the treasurer of his county, all fines, jury fees, and witness fees which have remained unclaimed for one year.

It was also his duty, under section 142 of the law governing the settlement of decedents' estates, upon receipt of the same, to pay over to the county treasurer the proceeds of the sale of real estate, where there are no heirs to claim it; and under section 143 of the same act, "If, after the expiration of two years from the final settlement of an estate, no heirs appear to claim the surplus, or any part thereof, the court shall direct it to be paid over to the county treasurer, to be by him paid over to the treasurer of state," etc.

This suit is brought under section 9 of the act of March 10th, 1873, Acts 1873, p. 18. The section reads as follows:

"Sec. 9. It shall be the further duty of the attorney general to ascertain from time to time the amounts paid to any public officer of the State, or any county officer, or other person, for unclaimed witness fees, court docket fees, license, money unclaimed in estates or guardianships, fines or forfeitures, or moneys that escheat to the State for want of heirs, or from any other source where the same is by any law required to be paid to the State, or any officer in trust for the State; and in all cases where the officers whose duty it shall be to collect the same shall fail, neglect or refuse for twelve months after the cause of action in favor of the State shall have accrued, or

shall fail, neglect or refuse to sue for and proceed to recover any property belonging to or which may escheat to the State, the said attorney general shall institute or cause to be instituted and prosecuted all necessary proceedings to compel the payment of or recovery of any such property."

By the 6th and 7th clauses of the 2d section of the act of May 27th, 1852, 1 R. S. 1876, p. 156 (Revision of 1881, sections 5611 and 5616), the auditor of state was authorized to "Institute and prosecute, in the name of the State, all proper suits for the recovery of any debts, moneys or property of the State, or for the ascertainment of any right or liability concerning the same;" and to "Direct and superintend the collection of all moneys due to the State, and employ counsel to prosecute suits instituted at his instance, on behalf of the State."

By section 7 of the act of March 8th, 1873, Revision of 1881, sec. 4435, the county superintendent of schools was authorized in certain instances "to institute suit in the name of the State of Indiana for the recovery of" "interest, fines, forfeitures, licenses, or other claims due the school funds and revenues of the State," from certain public officers, including county clerks.

Commenting on these statutory provisions, it was said in *Moore* v. *The State, ex rel., supra:* "It is apparent that, as to the officer who shall institute suits on behalf of the State, section 9 of the latter act" (act of March 10th, 1873, *supra*), "in reference to the matters herein mentioned, is in conflict with the 6th and 7th clauses of section 2 in the former act; so far, therefore, the former act must be held as repealed. And by section 7 of the act of March 8th, 1873, the county superintendent of common schools was the proper officer to institute such actions to recover several of the various funds claimed in this suit. (1 R. S. 1876, p. 816.) But section 9, *supra*, is the last expression of the legislative will, and therefore must control."

In the case of *The State, ex rel. Attorney General,* v. *Denny,* 67 Ind. 148, this court again had under consideration what was the proper construction of section 9 of the act of 1873,

and made the following declaration of the conclusion then reached: "It is the true intent and meaning of this supplemental act, as we construe its provisions, that the attorney general of the State shall be and is thereby authorized to collect at once, with or without suit, all amounts paid to any public officer of the State, or any county officer, or other person, and not paid by such officer or person into the proper treasury, as required by law, for unclaimed witness fees, court docket fees, license, money unclaimed in estates or guardianships, fines or forfeitures, or moneys that escheat to the State for want of heirs, and all amounts due from any other source, where the same was, by any law, required to be paid to the State, or any officer in trust for the State; *except* as to fines, forfeitures, and property escheating or belonging to the State, which he may not collect, with or without suit, or sue for the recovery of, until after the expiration of one year from the time the cause of action has accrued therefor, and then only in the event that the proper prosecuting attorney has failed, neglected or refused, for and during the said year, to collect the same, or to institute proceedings for the recovery thereof."

With this construction we are content to abide. It permits the attorney general, as from time to time he may ascertain that there is proper cause for it, to bring suits in behalf of the State, though he is not required to sue, except in cases where other officers whose duty it shall be to collect or sue shall fail or refuse to act for twelve months after the cause of action in favor of the State shall have accrued. We perceive no reason for saying that there is any inconsistency between this act, which confers upon the attorney general power to collect and to sue, and the previous acts referred to, which conferred similar powers on other officers. They may well stand all together, and whichever officer first institutes a suit will have the precedence. Repeals by implication are not favored, and we disapprove of the *dictum*—it is nothing more than a *dictum*—in *Moore* v. *The State, ex rel., supra,* to the effect that the former acts are repealed by the latter. There is as

much reason for saying that the earlier acts were inconsistent with each other, as that they are in conflict with the act of 1873.

Under the rule enunciated in *The State* v. *Denny, supra*, it is clear that the first paragraph of the complaint shows a cause of action as to some of the items sued for. The suit was commenced on the 30th of March, 1877, for moneys charged to have come into the hands of the principal defendant, for fines, docket fees, witness fees, etc., prior to the 4th day of November, 1876.

In the second paragraph of answer, in which all the defendants joined, and to which a demurrer for want of facts was sustained, it was alleged "that the cause of action sued on, and each part thereof, accrued to the plaintiff more than three years before the bringing of this suit."

The attorney general does not dispute the sufficiency of this plea, but claims that the error of sustaining the demurrer is cured by the ninth paragraph of answer, which is substantially the same in averment as the second. There is, however, this difference, which seems to be material, that Carr, the principal in the bond, does not join in the ninth paragraph.

The language of the code on the subject is this:

"All actions against a sheriff, or other public officer, or against such officer and his sureties on a public bond, growing out of a liability incurred by doing an act in an official capacity, or by the omission of an official duty," (must be brought) "within three years; but an action may be brought against the officer or his legal representatives, for money collected in an official capacity, and not paid over, at any time within six years." R. S. 1881, section 293.

This action is upon the bond, and consequently all the parties were entitled to avail themselves of the three years limitation. It can not be treated as an action to recover money by him collected as against Carr, without reference to the bond, and as a suit upon the bond as to the other defendants.

There can properly be no such mixture of different kinds and causes of action against different parties in the same complaint. Neither can it be said that the error was harmless, because the damages assessed against Carr were not greater than the amount found against his co-defendants, who had the benefit of the plea. He had the right to rely upon his exception to the erroneous ruling, and to permit the trial between the other parties upon an issue in which he had been denied the right to join, to go as it might.

There is some discussion in the briefs in reference to the right of the defendant Carr, after the suit had been commenced and before the service of the summons, to make payment to the county treasurer of any of the money sued for, and to direct the application of the payments so made. We perceive no reason why it was not lawful for him to pay to the county treasurer, pending the suit, any sums which he ought to have so paid without suit, and, having the right to pay, he clearly had the right to control the application of the payments. Under proper issues, the proof of such payments, made at any time before verdict, would seem to be admissible as affecting the amount of the recovery, but, of course, not affecting the right of the plaintiff to recover costs and penalties, which otherwise would be recoverable. Whether the attorney general would be entitled to claim fees for and out of the sums so paid, we do not consider.

The other points made, both upon the errors and cross errors assigned, are not such as require present consideration.

The judgment of the circuit court is reversed, with instructions to overrule the demurrer to the second paragraph of the answer.

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160 677

No. 9207.

St. John et al. v. Hendrickson.

Contract.—*Statute of Frauds.*—*False Representations.*—*Partnership.*—An oral representation by persons in partnership, falsely and fraudulently made, that each of them had $800 invested in the business, whereby another was induced to invest that sum, and become a member of the copartnership, whereas none of them had any sum so invested, is not within the statute of frauds, sec. 4909, R. S. 1881. Such a representation is one concerning the credit or solvency of another.

Same.—*Fraud.*—*Ratification.*—*Rescission.*—*Damages.*—Where one is induced by fraud, in the form of false representations, to enter into a contract, and afterwards, upon obtaining full knowledge of the fraud practiced upon him, and of all material facts, declines to repudiate it, and expressly ratifies it, he can neither rescind nor maintain an action for damages.

From the Decatur Circuit Court.

W. H. Mathews and *J. Q. Donnell*, for appellants.

S. B. Edwards, *W. A. Moore* and *B. F. Bennett*, for appellee.

Elliott, J.—By sifting the complaint of the appellee, and leaving out of consideration the mere matters of inducement and redundancy, we have the following material allegations: That the appellants were partners doing business under the style of "The Lone Tree Medicine Company;" that, to induce the appellee to invest in said partnership eight hundred dollars, they falsely represented to him that they each had invested therein the sum of eight hundred dollars, except St. John, whose skill in compounding the remedies which were manufactured and sold by the Medicine Company was estimated at that sum; that if the appellee would invest the sum named then the capital would be thirty-two hundred dollars; that the company was doing a large and profitable business; that the appellants conspired together for the purpose of defrauding him; that the representations were false, and were known to the appellants to be so; that the appellants had not invested the sum represented, but had invested and afterward withdrawn a sum not exceeding fifty dollars each; that appellee had no means of knowing whether the representations

were true; that he relied on them and was induced to invest the sum of eight hundred dollars. The appellants answered in several paragraphs, the fourth of which, following the order of discussion adopted by counsel, and which is, perhaps, the most convenient one, first demands consideration. That paragraph is substantially as follows: That the defendants were members of a copartnership under the name of "The Lone Tree Medicine Company," and that the representations which the plaintiff alleges to have been made were made in reference to, and concerning the conduct, character, credit and ability, trade and dealings of The Lone Tree Medicine Company, and that the representations were made orally. A demurrer to this paragraph was sustained, and appellants insist that this was error.

We shall confine our investigation and decision to the point discussed by counsel, and neither consider nor decide any other. The contention is, that there can be no recovery, for the reason that the representations were not in writing, and were made concerning the conduct, credit, ability, trade and dealings of persons other than the appellants. This position is rested upon the 6th section of the statute of frauds, which reads thus: "No action shall be maintained, to charge any person by reason of any representation made concerning the character, conduct, credit, ability, trade, or dealings of any other person, unless such representation be made in writing, and signed by the party to be charged thereby, or by some person thereunto by him legally authorized."

Authorities are cited to prove that representations, made by a partner concerning a firm of which he is a member, are within the statute, and no action can be maintained against him. *Devaux* v. *Steinkeller*, 6 Bing. N. C. 84; Benjamin Sales, section 446; Addison Contracts, 832.

We do not feel called upon to decide whether the statute does or does not apply to the case of a partner making representations concerning the credit or ability of his firm. The representations in this case are not to that effect, for they re-

fer to the actual investment made by each of the partners. They declare a substantive fact, distinct from the credit or ability of the firm, and they were not made to induce a person to give credit to the firm, but to induce him to become a member of it. The representations are not within the letter or the spirit of the statute, for they were not made for the purpose of giving the firm credit with the appellee. There was no error in the ruling upon the demurrer to the fourth paragraph of the answer.

It is alleged in the second paragraph of the answer, that after the appellee had been fully informed of the condition of The Lone Tree Medicine Company, and had obtained full knowledge of the amount each of the partners had paid into the partnership, and of all the property and business of the company, the appellants offered to release him from said partnership, and to place him in the same situation that he occupied prior to investing his money in said firm; that the appellee repaid to appellants the money they returned to him at the time they offered to release him from his connection with said firm, and elected to remain a member thereof, did remain a member, and afterwards purchased the interest of two of the members of the firm, and has since assisted in conducting its business. A demurrer was sustained to this answer.

It is undoubtedly the law, that there may be a waiver of a right to recover damages for loss resulting from false and fraudulent representations by an express affirmance. It is essential to such a waiver, that the party should possess full knowledge of the fraud practiced upon him; that he should intend to confirm the contract and abandon all right to recover for the loss resulting from the fraud. Cooley thus states the rule: "The fraud may also be waived by an express affirmance of the contract. Where an affirmance is relied upon it should appear that the party having a right to complain of the fraud had freely, and with a full knowledge of his rights, in some form, clearly manifested his intention to abide by the contract, and waive any remedy he might have had for the

deception." Cooley Torts, 505. This is the rule sanctioned and enforced by the decisions of this court. In *Doherty* v. *Bell*, 55 Ind. 205, there is an explicit recognition of this rule. It was there said by NIBLACK, J., speaking for the court: "If the appellee, with full knowledge of all the facts, as we think it fair to presume, from the allegations in the reply, it was intended to charge he had, and after the appellants became the owners of it, agreed to pay the note, provided a certain extension of time was allowed him, and in consideration thereof, such an extension was given him, we must regard him as having ratified the execution of the note, and as having waived whatever objection or defence he may have had to the manner of its execution. We do not hold that any new contract was created thereby, but that the old one was in that way recognized and ratified." Substantially, the same doctrine was declared long before, in *McQueen* v. *The State Bank*, 2 Ind. 413.

We fully recognize and approve the rule that a party may retain what he received, stand to his bargain, and recover for the loss caused him by the fraud. We do not mean to run counter to this rule. We neither hold nor mean to hold, that affirmance by retention of the thing bargained for cuts off an action for damages. We do hold that, where a party with full knowledge of all the material facts does an act which indicates his intention to stand to the contract and waive all right of action for the fraud, he can not maintain an action for the original wrong practiced upon him. Where the affirmance of the contract is equivalent to a ratification, all right of action is gone. Bigelow Fraud, 184. It is only equivalent to a ratification when made with full knowledge of the fraud and of all material facts, and with the intention of abiding by the contract, and waiving all right to recover for the deception.

Nor are we unmindful of the settled rule that a defrauded party has an election of remedies. We heartily approve the rule that he may elect either to rescind the contract or to

stand by his bargain and sue for damages resulting from the fraud practiced upon him. *Love* v. *Oldham*, 22 Ind. 51; 2 Kent Com. 664 (10th ed). We decide nothing that conflicts with this settled rule. We do decide that where a party with full knowledge declines to repudiate a transaction known to him to be fraudulent, and fully and expressly ratifies it, he can neither rescind nor maintain an action for damages.

The second paragraph of the answer shows an express ratification, with a clear intention to abide by the contract, after full knowledge of all the facts, and is good.

Judgment reversed.

No. 8136.

LOVINGER v. FIRST NATIONAL BANK OF MADISON.

PROMISSORY NOTE.—*Principal and Surety.—Payment.—Mistake.—Forgery.*—Where by a forgery of the signature of his former surety to a promissory note, the principal in a note discounted at bank deceives the bank and obtains a renewal of the loan and a surrender of the old note, and delivers it to the surety as paid and thereby induces him to believe that it has been paid, the truth coming to his knowledge only after the principal has become insolvent and absconded, the bank may recover from the surety, upon the old note, upon the ground that it was surrendered by mistake.

SAME.—*Renewal of Note by Forged Note.—Payment of Interest.—Discharge of Surety.*—A renewal of a loan by the use of a forged note, whereby the lender is deceived, interest being paid for the period in advance, is not binding upon the latter, and therefore will not discharge a surety for the original loan.

SUPREME COURT.—*Immaterial Evidence.—Harmless Error.*—A judgment will not be reversed for error in admitting immaterial evidence, unless it is made to appear that the appellant was in some material respect probably injured thereby.

From the Jefferson Circuit Court.

E. R. Wilson and *E. G. Hay*, for appellant.

C. A. Korbly, for appellee.

NIBLACK, J.—Action by the First National Bank of Madison, against James D. Lovinger, on a promissory note.

The complaint was substantially as follows:

The plaintiff, a national bank, says, that on the 22d day of May, 1877, James D. Lovinger and Otto R. Halpert jointly executed to the plaintiff, for a loan of money made to said Otto R. Halpert by said bank, as makers, a promissory note, whereby said Otto R. Halpert and James D. Lovinger, *as principals*, promised to pay said bank $300.00 three months after said date, with interest, attorneys' fees, and other usual stipulations. That the bank discounted said note on the faith and credit of said James D. Lovinger.

That when said note fell due in August, 1877, said Halpert brought a new note, for same amount, and of like terms, made by him, and purporting to have been made by said Lovinger, and renewed said first mentioned note.

And afterward, on November 24th, 1877, when the second note fell due, Otto R. Halpert brought to the plaintiff a third note, for a like sum of money, and of like terms, signed by said Halpert, and purporting to have been signed by said Lovinger, as joint makers, payable two months after date, and renewed said second note.

That at each of said renewals said Halpert represented that said Lovinger had executed said new notes, and that he and said Lovinger desired to renew the former notes; that plaintiff relied upon said representations, and renewed the loan made in the first place; that the first and second notes were respectively surrendered to Halpert upon their renewal, who delivered the first one to the defendant Lovinger, who destroyed it, which fact was alleged as a reason for not filing a copy of said note with the complaint; that the plaintiff at the time believed said second and third notes to be valid and genuine notes of said James D. Lovinger, and had no notice to the contrary, and relied wholly upon his solvency, credit and standing, in making said loan and discounts aforesaid, and not upon Halpert.

That said second and third notes were forgeries as to said James D. Lovinger, and he wholly repudiates them. That plaintiff had no knowledge whatever that said second and third notes were forgeries as to the signature of said Lovinger, until about the 22d day of January, 1878.

That said Halpert became heavily involved and insolvent in November and December, 1877, and on the 19th of January, 1878, absconded for parts unknown, leaving no property out of which said debt could be collected.

That, as soon as the plaintiff discovered that said last mentioned notes were forgeries, the plaintiff immediately notified the said Lovinger, that plaintiff would hold him responsible for and upon said first mentioned note, and that it was due and unpaid, and offered to surrender to him said last mentioned note, which he declined to receive, and which plaintiff brings into court.

The defendant answered in five paragraphs:

1. In general denial.

2. Setting up special matters, but withdrawn before issue joined.

3. Payment in money, and by the substitution of another note.

4. That the note in suit was given for a loan of money by plaintiff to said Otto R. Halpert, and for no other purpose; that Lovinger was surety only, which was known at the time by plaintiff; that the forged notes had the genuine signatures of said Halpert thereto, and were received by plaintiff without the knowledge or consent of Lovinger, who had no notice of the same, until informed by the officers of the bank on the 22d of January, 1878.

That on the 25th day of August, 1877, when said first note matured, said Halpert brought it to Lovinger representing to him that the same was paid off, and delivered it to this defendant, Lovinger, who in good faith believed the same was fully paid, as he lawfully might.

That on said 22d day of May, 1877, when said loan was

so made to said Halpert, and said note executed, and for four years prior thereto and from thence to the 22d of January, 1878, said Halpert resided within the jurisdiction of this court at Madison, Indiana; that during all that time he was on the most intimate terms and business relations with the officers of plaintiff, who made to him said loan, and had said subsequent transactions with him, they being well acquainted with his handwriting, and that this defendant had no knowledge of the same; that during all this time he was a prominent business man in said city, of good financial standing, credit, and reputation therein, and with said plaintiff; that he was solvent and responsible for said debt, carrying on therein and during all of said time a large and flourishing commercial college, and book and stationery store, owning and controlling goods and merchandise and other property of the value of $2,500, out of which said debt could have been made by legal process at any time from the maturity of said note in suit continuously until said Halpert absconded in January, 1878.

That had said plaintiff not delivered up said note in suit to said Halpert, thereby enabling him as aforesaid to deceive plaintiff with reference to the same, and had plaintiff not so kept from defendant all knowledge of said extensions on said two subsequent notes as alleged, defendant could have collected the same from said Halpert and saved himself from loss; but he alleges that by the acts and conduct of plaintiff in concealing from defendant all the aforesaid, and being entirely ignorant of all the same until the 22d day of January, 1878, aforesaid, and after said Halpert had become wholly insolvent and absconded to parts unknown, defendant by the *laches* of plaintiff is wholly deprived from recovering anything from said Halpert, and, if plaintiff is allowed to recover herein, he will be without any remedy.

5. That the defendant was only surety on the note sued on, and the time of the payment of the debt which that note was given to secure had, for a valuable consideration and

without the knowledge or consent of the defendant, been extended by the plaintiff.

A demurrer for want of sufficient facts was sustained to the fourth paragraph of the answer, and issue was joined on the third and fifth paragraphs. Trial by the court. Finding for the plaintiff. Motion for a new trial denied, and judgment on the finding.

Error is assigned:

1. Upon the overruling of the demurrer to the complaint.

2. Upon the sustaining of the demurrer to the fourth paragraph of the answer.

3. Upon the refusal of the court to grant a new trial.

Daniel on Negotiable Instruments, at section 1369, 2d ed., vol. 2, p. 343, says: "It is a general principle of law that money paid under a mistake of fact may be recovered back. And accordingly, where one pays money on forged paper by discounting or cashing it, he can always recover it back, provided he has not himself contributed materially to the mistake by his own fault or negligence, and provided that by an immediate or sufficiently early notice he enables the party to whom he has paid it to indemnify himself as far as possible. And now the doctrine is favored that even negligence in making the mistake is no bar to recovery. This rule is of general application. * * * * * *

"It follows from the rule as stated, that if a valid instrument be rendered up, and one that is forged given in place thereof, it will constitute no valid payment; and even an indorser of the note surrendered up will not be discharged—his liability having been fixed by due demand and notice."

This rule was fully recognized and applied by this court in the case of *Allen* v. *Sharpe*, 37 Ind. 67, and is, in principle, well supported by other text-writers, and well considered [illegible].

In the case of *Allen* v. *Sharpe*, *supra*, the insolvency of Mills at the time he induced the appellees in that case to accept the forged paper in place of the note then sued on, was

commented upon by the court as a circumstance of some importance bearing upon the equitable relations of the parties; but it was not a controlling element in that cause, and what was said concerning it did not affect the general principles upon which the case was decided.

There was nothing averred, either in the complaint or in the fourth paragraph of the answer in this case, from which culpable negligence on the part of the plaintiff can be inferred, or from which it can be claimed that there was unreasonable delay in giving notice of the forgeries after they were discovered.

The court did not, therefore, err, either in overruling the demurrer to the complaint, or in sustaining the demurrer to the fourth paragraph of the answer.

Thomas A. Pogue, the cashier of the bank, testified as a witness on behalf of the plaintiff.

Counsel for the plaintiff asked him if he would have loaned the money to Halpert if Lovinger, or some other good surety, had not gone on the note. To this, over the objection of the defendant, he answered, "We would not."

The witness was then, also, asked what was Lovinger's financial standing at the time the note sued on was made and at the times the two forged notes were taken from Halpert by the bank.

To this, over the like objection of the defendant, he answered, "Lovinger was then and still is a man of good standing and credit."

The defendant was a witness, also, at the trial, and, amongst other things, testified, that, on the 25th day of August, 1877, Halpert brought the note sued on in this action to him at his store, in the city of Madison, and in his presence destroyed it. He then offered to further testify that at that time Halpert told him that said note had been fully paid by him, the said Halpert, but the plaintiff objected and the court would not permit him to so testify.

Questions are made here upon these respective rulings of

the court admitting the testimony of Pogue, and rejecting the evidence offered by the defendant.

The evidence admitted, as well as rejected, was irrelevant to the real questions at issue at the trial, and, by the strict rules of evidence, it ought all to have been rejected; but we are unable to see that the answers of Pogue could have worked any injury to the defendant.

The material matters in controversy between the parties were, Had the note in suit been paid? If not, had it, for any of the causes alleged, ceased to be obligatory upon the defendant?

The motives or policy of the bank officers, in discounting the note, the standing and credit of the defendant when the note was discounted and afterwards, and what Halpert may have said privately to the defendant about his having paid the note, were all circumstances merely collateral and wholly immaterial to the real matters in controversy between the parties, as above stated. This court will not reverse a judgment because of the admission of immaterial evidence, unless it is made to appear that the appellant was in some material respect probably injured by the evidence admitted. *McDermitt* v. *Hubanks*, 25 Ind. 232.

It is also argued that the evidence showed a valid agreement for the extension of time for the payment of the original debt, without the knowledge or consent of the defendant; but we know of no principle on which such a construction of the evidence can be maintained.

It was made to appear by the evidence, that both of the so-called renewal notes were forgeries as to the defendant, and that the officers of the bank were fraudulently induced by Halpert to accept them as genuine, and to agree to a renewal of the original note by them in the belief that they were binding upon the defendant as well as Halpert.

Both of the pretended renewals of the original note were, consequently, invalid as contracts for the extension of the time of payment, and might have been repudiated and disregarded at any time by the plaintiff upon a discovery of the

fraud which had been practiced upon it, treating the amounts paid for interest on the forged notes as payments on the original note. *Albright* v. *Griffin*, 78 Ind. 182.

The material allegations of the complaint appear to have been fairly sustained by the evidence, and nothing has been shown from which we can infer that a new trial ought to have been granted.

The judgment is affirmed, with costs.

No. 8854.

The Board of Commissioners of Marion County v. Pressley, Sheriff.

81 361
136 539

81 361
149 165

Fees and Salaries.—*Sheriff's Mileage.—Constructive Fees.—Statute Construed.*—Under the fee and salary law of 1879, Acts 1879, p. 130, which allowed the sheriff mileage "for each mile necessarily travelled in going and returning to serve process," and forbade the charging of any constructive fee, the sheriff was not entitled to charge, for serving a special *venire* for jurors in a criminal case, mileage for double the distance from the court-house to the place where each juror was served. "Necessarily travelled" can not mean more than "actually travelled."

Same.—*Right of Appeal.*—The decision of the circuit court in reference to an officer's fees is not made final by force of the 36th section of the fee and salary act of 1879, Acts 1879, p. 130, and from the decision of such court, on appeal from the decision of a board of commissioners, there may be an appeal to the Supreme Court.

From the Marion Circuit Court.

A. C. Harris, for appellant.

W. W. Herod and *F. Winter*, for appellee.

Woods, J.—The appellee Pressley, as sheriff of the county, filed before the board of commissioners a claim for mileage. The board refused to allow a part of the claim, and he appealed to the circuit court, which gave judgment for the whole amount demanded.

There is no dispute concerning the facts, and the question presented is one of statutory construction.

The evidence shows that, in the case of *The State* v. *Joseph B. Wade*, pending in the criminal circuit court, at the April term, 1880, a special venire was issued to the sheriff, commanding him to summon fifty good and lawful men of the county to appear before the judge of the court on a day named, to serve as jurors. The appellee, by the aid of his deputies, served the writ on fifty persons, named in the return, and charged mileage for twice the distance from the court-house to the place where each one was served, aggregating 660 miles. The distance actually traversed in making the service upon the entire number did not exceed 200 miles.

By section 27 of the fee and salary law, approved March 31st, 1879, which governs the case, it was provided that "In all cases where the sheriff shall perform any service for the county required by law to be performed by him, and there is no provision for its payment, the board of county commissioners shall allow and pay such sheriff the same compensation as is allowed by law for similar services," etc.

The fees of sheriffs were defined by section 26 of the same act, the portions pertinent to the present discussion being as follows:

"For each mile necessarily travelled in going and returning to serve process, 10 cents. * * *

"For summoning a jury of twelve men, with mileage as above, 75 cents.

"For summoning a jury of less than twelve men, 10 cents for each juror served, with mileage as above."

Counsel for the appellee have contended, in an argument of elaborate ingenuity, that the word "necessarily," in the phrase "necessarily travelled," must not be regarded as meaning "actually;" that, when a single writ or process is to be served upon two or more individuals, a separate service upon each person is required, just as if he were named in a separate writ, and, though by chance found by the officer and served

at the same time with another, the miles travelled to reach them were necessarily travelled to reach each of them, and consequently the double mileage is, within the letter of the law, properly chargeable; just as it would be, they say, if two writs were served at one time upon the same person. The case of *Vannatta* v. *Brewer*, 85 Ill. 114, is the only authority cited in this connection.

The case, however, as we conceive, lends no support to the argument. It arose under a statute essentially different from ours, in this, that while mileage was given "for each mile of necessary travel" to serve the writ or process, the mode of determining the amount was specifically provided, namely, by "calculating from the place of holding the court to the place of residence of the defendant or witness." The court in that case held that "Taking any one witness alone, by himself, the officer might properly return that" (the distance from the court-house) "as the necessary travel in serving him. It is insisted," the opinion proceeds to say, "that in allowing to the word 'necessary' its proper force and significance, 'necessary travel' must mean the distance, only, which is indispensably travelled to serve the process; but the word 'necessary' is not infrequently used in the law in a less restrictive sense than that of absolute necessity. Looking at the one instance by itself, here complained of, the fees may, at first blush, seem larger than they should be, and to embrace a charge for more than the necessary travel in serving the writ; * * * but the officer in this one instance happened to be fortunate, and find all the witnesses at one time and place, and was saved any other journey. In another case, he might have to make as many separate journeys as there are witnesses. Again, officers frequently make fruitless journeys, and fail in effecting a service, owing to the absence from their place of residence of defendants or witnesses, in which case no mileage is allowed; or they may have to travel a greater distance than to the place of residence to make service, but the charge may only be for the distance to place of residence."

While this reasoning is forcible and pertinent to the statute which was under consideration, it shows how unwise and inequitable is the law which admits of or requires such an interpretation. It is certainly a better and fairer rule which, instead of "calculating from the place of holding the court to the place of residence of the defendant or witness" (each separately), allows a fit compensation for the service done under each writ, to be paid by the party upon whom the burden shall be finally and lawfully cast, and to be calculated according to the miles "necessarily travelled in going and returning to serve the process," whether upon one or many.

When mileage, according to the distance necessarily travelled, is allowed for the service of a summons, subpœna, venire, or like process, which is to be served on one or more persons, it means for the miles necessarily travelled in obedience to, or in performance of, the command of the writ; and, notwithstanding there may be allowed, besides the mileage, a fee for the service of the writ on each person, it does not follow that in respect to the mileage the writ should be regarded as a separate process for each individual required to be served, and that, by construction, mileage may be charged according to the distance from the court-house to the place where each person was found, when, in fact, that distance was not travelled; and especially must this be so, when the officer is expressly forbidden to claim any constructive fee.

We do not dissent from the proposition that the word "necessary" is frequently used in the law, as indeed we think it is used in this law, "in a less restrictive sense than absolutely necessary." See *Mueller* v. *The State*, 76 Ind. 310, and *Corey* v. *Swagger*, 74 Ind. 211. As counsel contend, "necessarily" is not synonymous with "actually," and yet we are clear that "miles necessarily travelled" to serve process can not properly be construed to embrace more miles than were actually traversed in order to complete the service.

We do not mean that under this law the sheriff, upon receiving a writ or process, was bound to predetermine, with

nice and mathematical accuracy, what route he should take in order to perform the command of the writ by travelling the fewest miles; nor that once started on the service he was compelled to keep going, without reference to any other consideration of duty or convenience, until all were served who could be found, before returning, in order to be entitled to his mileage for the distance actually travelled. And, on the other hand, we deem it equally clear that he was not permitted, when he had served a process on one of two or more whom he was commanded to serve, to return without reasonable excuse to the court-house, to "touch base" again, either actually or constructively, before proceeding to serve another who could have been reached conveniently on the same journey with less travel than would have been required in making such service at another time.

"But we further submit," say counsel, "that section 36 of the fee and salary law of 1879 constitutes the circuit court a court of final jurisdiction of questions of this kind." We do not think so. See *Ex Parte Ford*, 74 Ind. 415; *The State* v. *Barron*, 74 Ind. 374. The section provides that "Any officer being in doubt of the proper charge to be made for any service rendered, shall in no case charge any constructive fee; but he shall bring the question before the circuit judge of his county, in writing, and said judge shall decide the same, which decision shall be entered of record, as other orders of court are entered; * * * which order shall authorize such charge to be made as found by the court."

This, it will be observed, permits the court on proper application to decide what charge any officer may make for a "service rendered," and the order of the court "shall authorize such charge to be made."

Whether such an order can be made without notice to the party concerned and what the effect of the order when made, either in respect to or beyond the particular service decided upon, we are not called upon to consider. No order of the circuit court or judge is shown to have been asked for or

made under this section of the law in reference to the matter in issue. The appellee presented his claim to the board of commissioners, and appealed from the adverse decision to the circuit court. From the decision of that court the board had a clear right as in other cases to appeal to this court. *Grusenmeyer* v. *City of Logansport*, 76 Ind. 549.

The judgment is reversed, with instructions to grant a new trial.

81 366
126 510
81 366
139 672
81 366
143 517
81 366
154 379
155 389

No. 9171.

SAUER ET AL. *v.* TWINING ET AL.

CONSTITUTIONAL LAW.— *Vanderburgh Superior Court.*—The act of March 3d, 1877, Acts 1877, p. 52, establishing a superior court in the county of Vanderburgh, is constitutional and valid.

VALIDITY OF JUDGMENTS.— *Collateral Attack.*—The judgment of a court of general jurisdiction, having jurisdiction both of the subject-matter and of the parties, is valid, binding and conclusive, as to the matter in controversy, upon the parties, and those claiming under them; and, even though erroneous, such judgment can not be impeached or attacked in any collateral suit or proceeding.

From the Vanderburgh Superior Court.

R. A. Hill, for appellants.

C. Denby, D. B. Kumler and *T. E. Garvin*, for appellees.

HOWK, J.—This was a suit by the appellee Jonathan Edwards, trustee, as sole plaintiff, to foreclose a mortgage alleged to have been executed to him by the defendants, Peter Twining and Hannah, his wife, who are named as appellees in this court. The appellants, Mary E. Sauer and Frederick Sauer, her husband, were made defendants to the suit upon the ground that the said Mary E. had, or claimed to have, an interest in the mortgaged premises. The appellants jointly answered in two paragraphs, of which the first was a cross complaint, and

the second paragraph was a general denial. To the first paragraph, or cross complaint, the appellee Jonathan Edwards, trustee, answered in two paragraphs, of which the first was a general denial, and the second paragraph was a special defence. The appellants demurred to this second paragraph, on the ground that it did not state facts sufficient to constitute a defence to their cross complaint, which demurrer was overruled by the court, and to this decision they excepted and refused to reply thereto or plead further. The defendants Peter and Hannah Twining made default, and the appellee Edwards, trustee, recovered judgment for the amount due, and for the foreclosure of the mortgage, and sale of the mortgaged premises.

The error chiefly relied upon by the appellants' counsel for the reversal of the judgment below seems to be the decision of the court in overruling the demurrer to the second paragraph of the answer of Jonathan Edwards, trustee, to the first paragraph or cross complaint of the appellants.

In their cross complaint, the appellants alleged in substance, that the said Mary E. Sauer had been and was the absolute owner, in fee simple, and in her own right, of the premises described in the mortgage in suit; that she was feeble-minded, and had been reared by her mother in entire seclusion from society, and in utter ignorance of the value of said premises; and that after her mother's death, to wit, on the 9th day of July, 1869, the said Peter Twining, by means of certain false and fraudulent practices and appliances, had induced and procured her, the said Mary E., to sell and convey the said premises to him, the said Peter, for a greatly inadequate price, not exceeding the one-fifth part of the fair and reasonable value thereof; of all which the appellee Jonathan Edwards, trustee, had notice. Wherefore, etc.

In the second paragraph of his answer to the appellants' cross complaint, the appellee Edwards, trustee, alleged in substance, that on the —— day of January, 1878, in an action then pending in the Vanderburgh Circuit Court, wherein the said Mary E. and Frederick Sauer were plaintiffs, and

the said Peter Twining was defendant, and for the same cause of action as that set forth in their cross complaint, a judgment was rendered that said Mary E. Sauer should recover possession from said Peter Twining of the real estate described in said cross complaint, and that the deed executed by said Mary E. Sauer, in July, 1869, by her then name of Mary E. Taylor, conveying said premises to said Peter Twining, and being the deed referred to in said cross complaint, should be held for naught, void and of no effect; and that the said Peter Twining should recover of and from the said Mary E. Sauer the sum of $1,596.96, as and for the State and county taxes, paid by said Peter Twining, and for lasting and valuable improvements made upon said real estate, over and above the value of the rents and profits of said premises, with six per cent. interest on said sum from December 3d, 1877, and that, should said Mary E. and Frederick Sauer fail to pay said sum of $1,596.96, with interest, within sixty days from the date of said judgment, then the title of the said Peter Twining to the said premises should be quieted and forever set at rest, and the said Mary E. and Frederick Sauer should be forever enjoined and inhibited from setting up any claim, title or interest in or to the said real estate; and that, in the event of the payment of said sum of $1,596.96, with interest, by said Mary E. Sauer, if he, the said Peter Twining, should refuse to convey said real estate to said Mary E. Sauer, then, in that case, James T. Walker was appointed a commissioner to convey the same to her, as fully as the said Peter Twining might have done. And the appellee Edwards, trustee, alleged that said Mary E. Sauer wholly failed to pay the said sum of money, so recovered by said Peter Twining, within said term of sixty days or afterwards, but the same remained wholly unpaid; that, as the grantee of said Peter Twining, in the mortgage in suit, the appellee Edwards, trustee, was entitled to all the rights of said Twining in and to said premises; that by reason of said judgment, and the appellants' failure to pay said

sum of money as required by the terms thereof, the title of said Twining to said real estate became absolute and perfect; and that the said Mary E. Sauer and Frederick Sauer had no legal right, title or interest whatever in or to said premises.

It is claimed by the appellants' counsel, as we understand his argument, that the judgment pleaded by the appellee Edwards in bar of the appellants' cause of action, as stated in their cross complaint, was valid, binding and conclusive, in so far as it declared that the deed from Mary E. Sauer to Peter Twining should be held for naught, void and of no effect. But it is also claimed by counsel, that the residue of the judgment, to the effect that Twining should recover of said Mary E. Sauer a certain sum of money, and providing that, if such money was not paid within sixty days, Twining's title to the real estate should be quieted and forever set at rest, was *coram non judice*, outside of the jurisdiction of the court rendering the same, and was therefore invalid and void. It must be confessed, we think, that the judgment in question is somewhat anomalous and it may be erroneous; but it can not be said, that in a collateral proceeding, such as the one here presented, such judgment is invalid and void. In the rendition of the judgment, the Vanderburgh Circuit Court had jurisdiction both of the subject-matter of the action there pending, and of the parties thereto; and although errors may have intervened in the proceedings, which, upon appeal, would have necessarily resulted in the reversal of the judgment, yet they will not vitiate or avoid such judgment, when the same is attacked collaterally, as in the case now before us.

In support of his position, that so much of the judgment pleaded as provided for the recovery by Twining of the moneys expended by him in the payment of State and county taxes, and in lasting and valuable improvements on the real estate in controversy, in excess of the rents and profits thereof, was absolutely invalid and void, the appellants' counsel seems

to place his principal reliance upon the doctrine enunciated in the case of *Wernke* v. *Hazen*, 32 Ind. 431. That case is so widely different, as presented there, from the case at bar, that we hardly think it can be regarded as an authority upon any of the questions in this case. In the case cited, upon a direct appeal to this court, it was held that, in an action to recover possession of real property under a claim of absolute title, the defendant in possession could not have the value of permanent improvements made by him on such real estate allowed, except that he might set off the value of such improvements against the damages he might be found in such action to have caused the plaintiff by withholding or using, or injuring the property, to the extent of such damages; and that beyond this he must wait until the determination of the question of title, and bring his action under the statute concerning occupying claimants. Doubtless, this decision was right, upon the question then and there presented; but we fail to see that it has or can have any possible bearing upon the correct decision of the question presented in this case. There the trial court had decided that, in an action for the recovery of the possession of real estate, the defendant could not have the value of his permanent improvements thereon allowed to him in such action; and, on a direct appeal therefrom, this court held that there was no error in such decision. But in the case at bar the appellee Edwards pleaded a judgment in the second paragraph of his answer, from which no appeal had been taken, and which, even though erroneous, could not be questioned collaterally.

The Vanderburgh Circuit Court was a court of general jurisdiction, and in the judgment pleaded it had jurisdiction both of the subject-matter and of the parties. However erroneous it may have been, the judgment was valid, binding and conclusive as to the matter in controversy upon the parties thereto, and those claiming under them. It was pleaded by the appellee Edwards, as a former recovery on the same cause of action stated by the appellants in their

cross complaint; and upon the demurrer thereto for the want of sufficient facts, it constituted a good defence to such cause of action. *Richardson* v. *Jones*, 58 Ind. 240; *Turner* v. *Allen*, 66 Ind. 252; *Green* v. *Glynn*, 71 Ind. 336. This was so, even if it appeared that error had intervened in the former adjudication, for not having been appealed from the judgment was binding and conclusive, even though erroneous, and could not be attacked or impeached in a collateral proceeding. *Hume* v. *The Little Flat Rock Draining Association*, 72 Ind. 499, and cases cited.

The court committed no error therefore in overruling the appellants' demurrer to the second paragraph of answer to their cross complaint.

The appellants have also assigned as error the supposed unconstitutionality of the statute establishing the superior court of Vanderburgh county. The statute referred to is almost a literal copy of the act establishing the superior court of Tippecanoe county. The constitutionality of the latter act was fully considered by this court in the case of *Vickery* v. *Chase*, 50 Ind. 461, and the enactment was held to be constitutional and valid. The question, therefore, can not now be regarded as an open one, and we must decline to consider it further. Upon the authority of the case cited, we hold the statute of March 3d, 1877, establishing a superior court in the county of Vanderburgh, to be constitutional and valid.

The judgment is affirmed, with costs.

No. 8842.

Gough *v.* Clift et al.

Voluntary Assignment.—*Mortgage.—Married Women.—Equity of Redemption.*—A husband and wife joined in a mortgage of the husband's lands to secure his debt, and afterwards he made a voluntary assignment for the benefit of his creditors, under the statute, R. S. 1881, sections 2662 to 2683,

a large amount of personal property passing by the assignment. The trustees did not pay off the mortgage, and after a foreclosure and sale of the land under it, they sold the land subject to the mortgage, and the purchaser of the equity of redemption by arrangement with the purchaser at the foreclosure sale, at the instance of the trustees, did not redeem, but took a conveyance from the latter.

Held, that the trustees were not bound to pay off the mortgage or to redeem, and that the wife had no action against them for the proceeds of the sale by them, or otherwise.

From the Wayne Circuit Court.

C. H. Burchenal, for appellant.

H. C. Fox, for appellees.

MORRIS, C.—The appellant brought this suit against the appellees as the assignees of her husband, Charles T. Gough. The facts stated in her complaint are as follows:

On the 28th day of April, 1874, the appellant was, and still is, the wife of said Charles T. Gough; on that day, he was the owner of certain real estate in fee simple, situate in Henry county, Indiana, and he and the appellant as his wife executed a mortgage on the same to one Enoch Nation, to secure money borrowed of him by said Charles; on the 12th day of November, 1874, the said Charles and the appellant executed to said Nation another mortgage on said real estate, to secure the payment of a further loan made by said Charles of said Nation. It is averred that the appellant joined in said mortgages only as the surety of her husband; that the mortgages were duly recorded in Henry county, within forty-five days from the time of their execution.

On the 4th day of March, 1875, the said Charles T. Gough, being in failing circumstances, and a resident of Wayne county, Indiana, executed to the appellees an assignment of all his property, real and personal, including the land in Henry county, upon which said mortgages had been executed for the benefit of his creditors; that the assignment was duly filed and recorded in the counties of Wayne and Henry, and that the appellees had given bond and qualified according to law, and entered upon the discharge of their duties as such

assignees; that personal property to the amount of more than $20,000 came into the hands of the appellees as such assignees of said Charles T. Gough, yet they did not pay said mortgages, nor either of them, nor any part thereof, although the mortgaged premises were worth $2,000 over and above the amount of said mortgage debts; that they negligently suffered said mortgage debts to remain unpaid, until the same became due; that said Nation brought suit in the Henry Circuit Court to foreclose said mortgages, making the appellant and the appellees parties; that on the 17th day of September, 1875, said Nation recovered in said action a judgment for $5,307.29, and a decree for the foreclosure of said mortgages; that said premises were, on the 13th day of November, 1875, duly sold by the sheriff of Henry county, by virtue of a certified copy of said decree, to the said Nation, for the sum of $5,504.90; that a certificate of purchase was duly delivered by said sheriff to said Nation for said land.

The appellees, as such assignees, failed to redeem said mortgaged premises from said sale, although they had, as such assignees, in their hands, $20,000 of assets; that said land was worth $2,000 over and above the purchase-money paid for the same by said Nation; that on the third day of June, 1876, having given due notice of the time and place of sale, the appellees proceeded to offer said land for sale, publicly announcing to those present, that said land was to be sold subject to said mortgages and said foreclosure sale, and that the purchaser must redeem the same from such sale; that the appellant had no interest in said premises, and that the same would be sold free from all claims in or to the same on her part as the wife of said Charles T. Gough; that one Axiom S. Elliott, on the faith of the representations made by the appellees, purchased said land for $1,165, which sum was paid to and received by them; that the appellees agreed to execute to said Elliott a deed for said land as soon as the sale should be approved by the proper court; that said sale was reported to the proper court, approved and ratified, and the appellees em-

powered to execute a deed to the said Elliott, who was to redeem said land; that the appellant was at once informed of said arrangement to redeem, and, relying upon it, took no steps himself to redeem said land; that the appellees did not execute a deed to Elliott as directed, but instead of so doing, for the purpose of defeating the appellant's claim to any interest in said land, the appellees omitted to make said deed, and allowed and procured the said Elliott to omit redeeming said land from said sheriff's sale, but to make an arrangement with the purchaser at said sheriff's sale by which the year allowed by law for the redemption of said land from said sale should expire, and that the purchaser at the sheriff's sale should take a deed from the sheriff, and then convey to said Elliott, all of which was done accordingly, and the said Elliott became the owner of said land.

It is further stated, that at the time the appellees sold said land, the right and equity of redemption held in the same by them was of no value whatever, and could not have been sold for anything, had it not been for the representations of the appellees that the appellant had no right to or interest in the same; that her interest in said land was of greater value than the $1,165 realized by the appellees from the sale of the same; that she had an inchoate interest in said land, being one-third thereof in fee, which was in no way incumbered otherwise than by said mortgages; that the appellees had colluded with Elliott and others to defeat the appellant's rights; that she had demanded of the appellees the amount received by them for the sale of said land, but that they refused to pay it to her.

The questions arising in this case are of considerable importance, and involve some difficulty. They have been ably discussed by counsel on both sides.

The premises mortgaged to Nation have been twice sold, once to Nation for $5,504.90, paying his mortgages and the debts secured thereby, and the cost of foreclosure and sale. They were also sold by the appellees for $1,165. The mortgaged

premises have, therefore, produced $6,669.90, being $1,165 more than sufficient to pay the mortgage debts. Had Nation bought the mortgaged lands for $6,669.90, and no assignment had been made by Charles T. Gough to the appellees, to whom would the $1,165, the surplus of the proceeds of the sale, belong, to Charles T. Gough, the husband, or to the appellant? Upon what possible ground could the appellant claim this surplus as against her husband? Not simply because she was his wife, for as such, as a general rule, she could not claim anything; she could not, as his wife, assert her interest in his estate until his death; nor could she claim such surplus under the act of March the 11th, 1875, for, by its terms, it does not apply to judicial sales in which the wife's inchoate interest is directed to be sold by the judgment or decree upon which the sale takes place; nor, should we go further, and regard the surplus as real estate, as a part of the mortgaged land, could the appellant claim it. She could not, as we have seen, claim it under the act of 1875, for by the decree her inchoate interest in the land was directed to be sold; she could not claim it simply as the wife of Charles T. Gough, for, as such, as before stated, her right attaches only at his death.

Charles T. Gough transferred all his interest in the mortgaged lands to the appellees for the benefit of his creditors. He also transferred to them, as is alleged in the complaint, some $20,000 or more of personal assets, for the same purpose. It is earnestly insisted by the appellant's counsel, that it was the duty of the appellees to pay off the debts due from their assignor to Nation, redeem the mortgaged premises and protect the appellant as the surety of her husband, Charles T. Gough.

Whether or not the appellant, under the circumstances stated in the complaint, could be regarded, or rather, whether her inchoate interest in her husband's lands could be regarded, as surety for her husband, may be quite doubtful. The authorities are not in entire harmony upon the question. See on the one side, *Hawley* v. *Bradford*, 9 Paige, 200; *Jenness* v. *Cutler*,

12 Kansas, 500; Brandt Suretyship, p. 29. On the other, *Dawson* v. *Bank of Whitehaven*, 20 Moak's Eng. R. 805; *Drew* v. *Lockett*, 32 Beav. 499. But in all the cases the wife sought relief after the death of the husband. In the view which we have taken of this case, it is not necessary to, nor do we, decide the question.

We know of no rule of law which required the appellees to redeem the land mortgaged by Charles T. Gough and the appellant to Nation, for her benefit. She was not one of the creditors of Charles T. Gough, nor did she become entitled to any of the assets assigned to the appellees by her husband, upon the sale of her inchoate interest in his land upon a decree foreclosing the mortgages executed by her and him to secure his debt. The assignees could not pay to her, under such circumstances, any of the funds in their hands. If not required to pay the creditors of the husband, the fund should be paid to him. They were, therefore, under no obligations to the appellant to redeem from said mortgages. It was their duty to the creditors, not to the appellant, to manage the estate to the best advantage for them. If they failed in this, the creditors or the assignor might complain.

Section 13 of the act in relation to voluntary assignments is as follows:

"Any part of the property assigned on which there are liens or encumbrances, may be sold by the trustee, subject to such liens or encumbrances; but in case the trustee should be satisfied that the general fund would be materially increased by the payment of such liens or encumbrances, he shall make application by petition, to the judge of the common pleas court, for leave to so do, and abide its order in that behalf. Before the holder of any lien or encumbrance shall be entitled to receive any portion of his debt out of the general fund, he shall proceed to enforce the payment of his debt by sale, or otherwise, of the property on which such lien or encumbrance exists; and for the residue of such claim, such holder of such lien or

encumbrance shall share *pro rata* with the other creditors, if entitled so to do by the laws of this State."

This provision not only authorizes the assignee or trustee to sell, subject to existing liens, any of the assigned property, but forbids him, except by the direction of the court upon petition, from discharging such liens. It also requires the holder of such liens or encumbrances to exhaust the same, if the debt is not paid by the assignee upon the direction of the proper court, before he can share in the trust fund. Nor is the fund in the hands of the trustee required to be applied in discharge of mortgages upon the trust property for the protection of the interest of the assignor's wife in the property, as is the personal property of a deceased husband, for the obvious reason that, in the former case, the husband is still living. We do not think section 109, 2 R. S. 1876, p. 534, applies to voluntary assignments, for this reason: the case of *Morgan* v. *Sackett*, 57 Ind. 580, and other similar cases, are not, we think, applicable to this case.

After the foreclosure and sale of the mortgaged premises, the appellees, as trustees for the creditors of Charles T. Gough, had the right, by virtue of the assignment made to them by said Gough, to redeem from such foreclosure sale, or they might, as they did, sell to another the right to redeem. This they did, but they could only sell the right transferred to them by their assignor. They could not sell any right which the appellant might have had to redeem. Nor could any representations made by them to the purchaser, whether true or false, affect in any way her rights. She was not a party to such proceedings and could not be bound by them. Nor would any representations made by the appellees to Elliott, the purchaser of the right to redeem, create any duty or impose any obligation upon the appellees as to the appellant. If she relied to her prejudice upon anything which they may have said to Elliott, and not to her, she is, we think, without remedy.

Though the appellees had the right to redeem from the

sheriff's sale to Nation, or to sell the right to redeem, yet, neither they nor their vendee were obliged to redeem; nor did either redeem from said sale. By the sale to Nation, the appellant's interest in the land passed to him, subject only to the right of redemption. It was not redeemed, but, at the expiration of the year allowed for redemption, the land was conveyed to him by the sheriff. It follows that the appellant has no interest, legal or equitable, in the funds in the hands of the appellees. There was no error in sustaining the demurrer to the complaint.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be affirmed, at the costs of the appellant.

ON PETITION FOR A REHEARING.

MORRIS, C.—The appellant asks a rehearing in the case, on the ground that since the opinion was filed this court has held, in the case of *Lawson* v. *DeBolt*, 78 Ind. 563, a sale made by the assignee of a failing debtor is a judicial sale. The only interest which the assignor Gough had in the real estate transferred to his assignees was the right to redeem the same from the sheriff's sale made on mortgages executed by him and the appellant as his wife to one Nation. It was this right to redeem which passed by the assignment to the assignees of Charles T. Gough. It passed to them as fully and completely, and to the same extent, as it would have passed by his deed of the land to any one else. In this right of redemption the appellant had no right or interest. His deed alone conveyed his right to redeem. If the appellant had, after the sheriff's sale, any right in the land sold, it was the right to redeem. If she had such right, and we concede that she had, it did not pass by the assignment to the appellees; it continued in her. As assignees of Charles T. Gough, the appellees could not sell any right or interest which the appellant had in said land, and, if they attempted to do so, her rights were not affected in any way. All that the appellees could sell as such as-

signees was the interest of their assignor; that they could sell, and the proceeds of such sale belonged to them as the trustees of the assignor's creditors, and not to the appellant.

In no case can the assignees of the husband dispose of the interest which the wife may have in his real estate. They sell the interest conveyed to them by the husband—nothing else, and upon the proceeds of such sale the assignor's wife can have no claim.

If it is said that equity will regard the proceeds of the sale as standing for the land or right sold, the question again arises, what was sold? Had the assignees made the sale six months before the expiration of the time allowed for redemption, could not the appellant have redeemed from the sheriff's sale to Nation? Had the sale made by them produced $10 instead of $1,165, would that have taken from the appellant her right to redeem from the sale to Nation? If she can claim the fund in controversy, it must be for the reason that the sale made by the appellees passed her inchoate interest in the land to Elliott, the purchaser. We think the sale could not have this effect, and for this reason we also think the question as to the rights of married women, under the act of 1875, is not involved in the case.

PER CURIAM.—The petition for a rehearing is overruled.

No. 10,133.

KENNEDY v. THE STATE.

CRIMINAL LAW.—*Continuance.—Evidence.*—Where a fact not constituting the body of the offence, but a circumstance tending to prove guilt, is to be put in evidence by the prosecution, and the defendant learns the intention of the State too late to procure evidence which will explain the fact, it is error to overrule his motion, on proper affidavit, to postpone the trial so as to give him the opportunity.

SAME.—*Affidavit of Absent Witness.*—The affidavit of the absent witness need not be made a part of the application for a continuance.

SAME.—*Burglary.—Ownership.—Indictment.—Landlord and Tenant.*—Where the building alleged to have been burglariously entered is in possession of a lessee or tenant, it may properly be charged to be his property, or that of the landlord, sec. 1753, R. S 1881.

From the Decatur Circuit Court.

J. S. Scobey and *D. Watts*, for appellant.

D. P. Baldwin, Attorney General, *W. W. Thornton* and *M. D. Tackett*, Prosecuting Attorney, for the State.

ELLIOTT, J.—On the 21st day of February, 1882, an indictment was preferred against the appellant, charging him with the crime of burglary; three days afterwards the case was called for trial, a plea of not guilty entered, and a motion to postpone filed. The motion was overruled, and this ruling presents one of the questions for our consideration.

The affidavit filed in support of the motion contains all the essential statements required by the statute, and clearly shows the materiality of the testimony, and the residence of the absent witness. The only question fairly admitting of debate, is whether it shows proper diligence. Upon this point the statements are, in substance, that it was not until the morning of the day of the call that the appellant learned that the State expected to prove, as a criminative circumstance, that he took from a lot where one Stark was feeding hogs, a grain sack, and carried it to the mill, alleged to have been burglariously entered; that the witness by whom he could explain the circumstance, one John Murray, had not been subpœnaed because he did not know, or expect, until the time named, that any such evidence would be offered against him. We think the trial should have been postponed. Important as it is that trials in criminal prosecutions should speedily follow indictment, it is not of such overwhelming importance as to take from an accused person the right to meet evidence adduced against him. Where an accused discovers that a circumstance will be used against him which he can satisfactorily explain,

he should be allowed a reasonable opportunity for making the explanation. It can not be successfully maintained that the indictment sufficiently put the appellant upon enquiry as to the circumstances indirectly and remotely bearing upon the question of his guilt. It did undoubtedly put him upon enquiry as to all matters connected with the principal elements of the crime charged against him. We do not think that it did this as to such an isolated and remote criminative circumstance, as taking from an apparently secret spot a sack for carrying away the property feloniously taken. While such a circumstance might tend to establish guilt, it was not one which the presentment of an indictment would apprise him was to be adduced against him upon the trial.

We can not agree with the counsel for the State that the affidavit of the absent witness must be made part of the application for continuance. The case relied upon as sustaining this proposition lends it no support. In that case, *Gibson* v. *The State*, 9 Ind. 264, the motion was not for a continuance, but for a new trial.

It appeared in evidence that the mill burglariously entered was owned by William Grant; that Stephen Armstrong had leased it; that the terms of the lease were that the lessee should pay as rent one-half of the profits earned in the business of milling; that he should have possession and control of the business, and that the lessor should have nothing to do with the control or running of the mill. The mill charged to have been burglariously entered was alleged to be the property of Stephen Armstrong. The court instructed the jury that if the latter had leased the mill, and was in the exclusive possession of it at the time it was burglariously entered, he was the owner within the meaning of the law. The instruction states the law correctly. A tenant in possession is deemed the owner. The indictment may allege the ownership to be in him, or it may under the present statute charge it to be in the landlord. *McCrillis* v. *The State*, 69 Ind. 159.

The manner in which rent is to be paid does not change the

rule. In the present case Armstrong was as much the tenant of Grant as though the rent was payable in money. There was no partnership, one was tenant and the other landlord.

For the error in refusing a continuance, the judgment must be reversed.

Reversed.

No. 9132.

Thomas *v.* Noel.

Emblements.—*Sheriff's Sale.*—*Redemption.*—*Landlord and Tenant.*—*Crops.*—The law favors the right of one who sows to reap, but, if he knows he can not reap before the expiration of his right of possession, he sows at his peril; so, where an execution defendant remains in possession of real estate sold on execution during the year for redemption and puts in a crop which will not mature until after the year expires, and he fails to redeem, he is not entitled to such crops.

From the Posey Circuit Court.

A. P. Hovey and *G. V. Menzies*, for appellant.

W. P. Edson and *E. M. Spencer*, for appellee.

Woods, J.—The appellant sued the appellee for an alleged unlawful conversion of wheat. The evidence in the case consisted of an agreed statement of the facts, made a part of the record by an order of the court, and the question discussed by counsel is whether, upon the facts so stated, the decision of the court in favor of the defendant was right.

The following are the facts:

On the 4th day of March, 1879, the land upon which the wheat was grown was duly sold by the sheriff to the appellee, by virtue of an execution issued upon a judgment against the appellant, who owned and was at the time in possession of the land, and remained in possession until March 15th, 1880, when the defendant, to whom, in default of a redemption from the sale, the sheriff had made a deed, took possession; the crops of wheat and corn which matured in the summer and fall of 1879, the appellant took, and in November, 1879, sowed wheat

upon the land, and in the summer of 1880 re-entered upon the land and undertook to reap the crop from the seed so sown, but was forbidden to do so by the defendant. The plaintiff nevertheless cut a part of the wheat, and the defendant, who cut the remainder, carried it all away, to wit, 180 bushels, worth 60 cents per bushel.

The appellant clearly had no right to any part of the wheat. While the general rule, adopted for the promotion of agriculture and husbandry, is that the one who sows shall reap, it is equally well settled that the tenant who sows, knowing that he can not reap before the expiration of his tenancy and right of possession, does it at his peril.

The position of one whose land has been sold on execution and whose right of possession must expire at the end of a year from the sale, unless he redeems, can not be better. *Heavilon* v. *Farmers Bank, etc.*, *ante*, p. 249. It may be said that he intended to redeem, and was prevented by unforeseen and uncontrollable causes; but the law can not enquire into the good faith of such a pretence. The party in such situation must know, or at least make his own estimate, of his ability to redeem, and if he chooses to put out crops which he may not reap within the year given him to redeem, without securing by agreement with the purchaser of the land the rights of a tenant after the expiration of the year, he must suffer the consequences. See Taylor Landlord and Tenant, sections 534–6; 1 Washb. Real Prop. (3d ed.) 118–124.

Judgment affirmed, with costs.

No. 9274.

81 388
143 334
81 383
147 174

TOLER ET AL. *v.* KEIHER.

SPECIAL VERDICT.—*Instructions.*—*Practice.*—Where a special verdict is demanded, it is error to instruct the jury generally concerning the law of the case, but instructions as to the nature of the action and issues, form of verdict and general duties of the jury are proper.

SAME.—*Harmless Error.*—Where a special verdict is demanded, it is error to direct the jury to return also a general verdict, but this will be cured if the court afterwards disregard such general verdict and act only on the special verdict.

SAME.—Where a jury return a special verdict which is imperfect by the omission of a formal conclusion, the court may instruct them as to the same, and require them to retire and add it.

SUPREME COURT.—*Harmless Error.*—Where it affirmatively appears by the record of the whole case that a judgment is right on the merits, it will not be reversed for harmless intermediate errors, such as giving instructions as to the law of the case or requiring a general verdict also, where a special verdict has been demanded.

From the Union Circuit Court.

T. D. Evans, for appellants.

L. H. Stanford, for appellee.

BICKNELL, C. C.—This was a suit upon a note and mortgage by the appellee against the appellants.

The note was dated February 11th, 1878, and was payable to the order of the appellee two years after date, at the National Bank of Liberty, Indiana, for $2,320.40, with interest at ten per cent. from date, and five per cent. attorney's fees.

It was therefore due on the last day of grace, to wit, on February 14th, 1880, *Benson* v. *Adams*, 69 Ind. 353; and it bore interest at ten per cent. until maturity, and afterward at six per cent, *Richards* v. *McPherson*, 74 Ind. 158; and the amount of the attorney's fees could not exceed five per cent. on the amount due on the note. In *Smiley* v. *Meir*, 47 Ind. 559, this court said: "The note, which was made part of the complaint, itself fixed the amount of the attorney's fee, and was, we think, in substance, the same as if it had been alleged in the complaint that a reasonable attorney's fee was ten per cent. on the amount due on the promissory note."

The defendants answered in six paragraphs, to all of which, except the first paragraph, the plaintiff replied by general denials.

In the first paragraph the defendants admit that the plaintiff has a good cause of action on the note and mortgage for

$2,280.40, with interest at ten per cent. from the date of the note until its maturity, and afterwards at six per cent.

The plaintiff replied to this paragraph, admitting all its material allegations, and demanding judgment and foreclosure for $2,280.40, with ten per cent. interest from February 11th, 1878, to February 14th, 1880, and six per cent. afterward, and five per cent attorneys' fees, making in all $2,855.20.

The plaintiff also moved for judgment in his favor for the amount admitted to be due as aforesaid. This motion was overruled by the court. The issues were tried by a jury, who, at the request of the defendants, were directed by the court to return a special verdict, which they did, as follows:

"We, the jury, having been required by the court to find a special verdict, do find the facts in said cause to be as follows:

"1. That on February 11th, 1878, the defendant George Toler was indebted to the plaintiff for work and labor and money loaned, $602.40.

"2. That on said day the plaintiff loaned said defendant the further sum of $1,678.

"3. That of the latter sum the plaintiff borrowed $800 from the Union County National Bank, the defendant George Toler agreeing to pay the excessive interest over ten per cent., which the bank charged the plaintiff.

"4. That the plaintiff included in the note in suit the said $602.40, and the said sum of $1,678, and the sum of $40 to cover the excessive interest he might have to pay the bank.

"5. That said plaintiff paid said bank, on account of such excessive interest, only $2.80.

"6. That there was no fraud in the execution of the note or mortgage.

"7. That the mortgage in suit was executed in good faith to secure the payment of the note.

"8. That no part of the money due on note or mortgage was ever paid.

"9. That on February 11th, 1880, James P. Kennedy, cashier of the First National Bank of Liberty, tendered to plaintiff the principal, with six per cent. interest from the date of the note, upon condition that said plaintiff would surrender to him the note and cancel the mortgage.

"10. That on the 14th of February, 1880, said Kennedy tendered to plaintiff's attorneys, for the plaintiff, the sum of $2,555.19, in full payment of the note and mortgage in suit, upon condition that the note be surrendered and mortgage cancelled.

"11. That there was no other tender than as above shown.

"12. That the defendants, or either of them, never offered to rescind the contract by a tender of the money received from the plaintiff, as the consideration of the note, prior to February 11th, 1880.

"13. That the actual principal of the money that George Toler received was the said sums of $602.40 and $1,678, making $2,280.40

And interest on same for 2 years, at 10 per cent .	456.08
And interest on same for 8 mos. 11 dys, at 6 per cent .	95.38
The 5 per cent. att'y's fees agreed on note	141.59
Making total amount due	$2,973.45

"If, upon the above facts, the court shall be of opinion that the law is with the plaintiff, we find for the plaintiff and assess his damages at $2,973.45, and the foreclosure of the mortgage. If the law is with the defendant, we find for the defendant."

With this special verdict the jury also returned the following general verdict:

"We, the jury, find for the plaintiff and assess his damages at $2,973.45 against the defendant George Toler, and for the foreclosure of the mortgage against both of the defendants."

The plaintiff moved for judgment on the special verdict; the defendants moved for a new trial; the motion for a new trial was overruled and judgment was rendered upon the special verdict. The defendants appealed; they have assigned nine

errors, none of which are available except the fifth. The first and second are expressly waived in the appellants' brief. The third is an irregularity occurring upon the trial, and, therefore, belongs to the motion for a new trial. The fourth, sixth, seventh, eighth and ninth are regarded as waived, because they are not discussed in the appellants' brief. The fifth is error of the court in overruling the motion for a new trial. The reasons for a new trial are:

1. Irregularity in the proceedings of the court by which the defendants were prevented from having a fair trial, in this: the court proceeded of its own motion to give written instructions to the jury, after having been requested in writing by the defendants to have the jury give a special verdict, and because the court, of its own motion, instructed the jury to find a general verdict in addition to their special verdict.

2. Because the damages assessed againt the defendants are too large.

3. Because the verdict is not sustained by sufficient evidence.

4. That the court erred in giving to the jury, of its own motion, each and all of the instructions from one to eight, inclusive, because a special verdict had been asked for by the defendants.

5. That the court erred in overruling the motion of the defendants, in accepting the general verdict of the jury.

6. The court erred in receiving the special and general verdicts of the jury and discharging them.

The verdict is sustained by sufficient evidence, and the damages are not too large.

The bill of exceptions shows an exception to each of the instructions, and proceeds as follows: "And thereupon the jury, having retired, returned into open court with a special and a general verdict, and the same, having been examined by the court, was by the court refused, and thereupon the court read to the jury as follows: 'If upon the above facts, the

court shall be of opinion that the law is with the plaintiff, we find for the plaintiff and assess his damages at ——, and if the law is with the defendant, we find for the defendant.' The words and phrases aforesaid, so read to the jury by the court, not being set forth in the original special verdict returned by the jury, nor any other words and phrases of the same import and meaning, and the defendant objected to the court reading the same to the jury, at the time and before the same were so read, but the court overruled the objection and the defendants at the time excepted; and thereupon the jury, having again retired, return into open court their general and special verdict, to the receiving of which the defendants at the time objected, because a general and special verdict could not be returned by a jury, when the parties had requested a special verdict, wherefore defendant objected to the court receiving either or both of said verdicts, which objection was by the court overruled, and to which ruling the defendant excepted at the time. And the court thereupon received both said general and special verdicts; and, on plaintiff's motion, the judgment of the court heretofore set out in the record was rendered on the special verdict of the jury, to the rendering of which the defendants at the time excepted."

A demand for a special verdict does not relieve the court of the duty of instructing the jury as to the nature of the action and the issues, and as to the form of their special verdict and their general duty in relation thereto; but as the special verdict is to state facts only, leaving the law to the court, a demand therefor makes it unnecessary, and therefore improper, to give the jury instructions as to the law of the case. Therefore, so much of the third instruction as undertakes to tell the jury what is a sufficient tender, need not have been given, but all the other instructions were entirely appropriate, and fairly informed the jury of the nature of their duties, except so much of the seventh and eighth instructions as required the jury, together with their special verdict, to find also

a general verdict, and directed them as to the requisites and form of such general verdict.

It was undoubtedly error, after a special verdict had been demanded and ordered, to instruct the jury to return also a general verdict. *Bird* v. *Lanius*, 7 Ind. 615; *Noble* v. *Enos*, 19 Ind. 72.

There was no error in the action of the court on the return by the jury of the special verdict without its formal conclusion; the court did right in sending the jury back, with instructions to add to the special verdict its proper formal conclusion, and when the special verdict was returned corrected, but improperly accompanied by a general verdict, the court did right in declining to act upon the general verdict, and in rendering judgment upon the special verdict. The errors hereinbefore pointed out will not warrant the reversal of the judgment. The record of the whole case shows that the judgment was right on the merits, and in such cases a judgment will not be reversed for harmless intermediate errors. *Whitworth* v. *Ballard*, 56 Ind. 279; *Pennington* v. *Nave*, 15 Ind. 323; *VanPelt* v. *Corwine*, 6 Ind. 363. A verdict in accordance with the weight of evidence, and with justice, will not be disturbed on account of erroneous instructions to the jury. *Roberts* v. *Nodwift*, 8 Ind. 339; *The City of Logansport* v. *Dunn*, 8 Ind. 378. "No judgment shall be stayed or reversed, in whole or in part, * * where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below." 2 R. S. 1876, p. 246, section 580. *Thompson* v. *Wilson*, 40 Ind. 192.

The judgment of the court below ought to be affirmed.

Per Curiam.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellants.

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139 197.
81 390
141 460

No. 8430.

FERRIER *v.* DEUTCHMAN.

SHERIFF'S SALE.—*Appraisers.—Sale in Solido.—Return on Execution.—Evidence.—Real Estate, Action to Recover.—Presumption.*—A sheriff's return to an execution, showing the sale of real estate, subject to appraisement, is not materially defective for a failure to show how the appraisers were selected; nor for a failure to show that separate parcels of land sold *in solido* were first offered separately. Where the return is silent as to such matters the presumption will be indulged, *prima facie*, that the sheriff did his duty concerning them. Such return is admissible in evidence in ejectment to prove title in the purchaser.

SAME.—*Sheriff's Deed.*—A sheriff's certificate of sale of real estate is not ordinarily material evidence in support of the purchaser's title, but the deed is admissible if it rests on a valid return.

From the Clark Circuit Court.

M. C. Hester, for appellant.

J. K. Marsh, for appellee.

NIBLACK, J.—Action by William T. Ferrier against Martin Deutchman to recover the possession of lot No. 17, and a part of lot No. 57, in the town of Charlestown, in Clark county. Answer in general denial; trial by the court; finding for the defendant; motion for a new trial overruled, and judgment on the finding.

This is the second appeal in this cause, to this court, both of the judgments appealed from being in favor of the defendant below. *Ferrier* v. *Deutchman*, 51 Ind. 21.

At the last as well as at the first trial, the plaintiff relied upon a sheriff's sale to establish title to the lots in suit, and again introduced and had read in evidence four several judgments rendered in the court of common pleas of Clark county, against the defendant, three of said judgments being in favor of the State of Indiana, and the remaining one being in favor of the town of Charlestown, above named.

The plaintiff also offered and had read in evidence three executions, severally issued on the three judgments in favor of the State, and a fee bill issued on the judgment in favor

of the town of Charlestown for costs, amounting to the sum of $30.95.

The plaintiff then offered in evidence the return of the sheriff of Clark county to the fee bill, issued as above, showing a levy upon the lots in controversy and a sale of them to him, but the court refused to permit the return to be read in evidence.

The plaintiff also offered in evidence a certificate of the sale of the lots executed to him by the sheriff; also a deed from the sheriff, both purporting to be based upon the sheriff's return, but they were severally excluded.

The return stated that by virtue of the fee bill, and of the three executions issued, as herein above set forth, he, on the 20th day of February, 1872, levied upon the lots described in the complaint, and that on the 23d day of March, 1872, after having given due notice of the time and place in the various modes prescribed by law, and after having said lots appraised according to law, he first offered at public auction the rents and profits of said lots for a term of years not exceeding seven, and receiving no bid whatever for such rents and profits, he then, in like manner, "proceeded to offer the fee simple of" said lots, "and William T. Ferrier bid therefor the sum of twenty dollars," and he being the highest and best bidder, and that being the highest and best price bid for the same, said lots were struck off and sold to him; that the said Ferrier had paid the amount so bid by him, and had received a certificate of his purchase of the lots.

A schedule and appraisement of the lots accompanied the return, purporting to be made under oath by two disinterested householders of the neighborhood, in which the value of lot 17 was fixed at $400, and the part of lot 57 at $1,000; but in which it was also stated that said lots were subject to certain incumbrances, and that the interest of Deutchman in said lots, over and above the incumbrances, was of no value.

Neither the return nor the schedule stated the manner in which the appraisers were selected.

The appellant complains that the court erred in refusing to

admit the sheriff's return, as well as the certificate of purchase and the sheriff's deed, in evidence.

In support of the action of the court in excluding the sheriff's return, it is argued:

First. That the return was materially defective in not stating by whom, or in what manner, the appraisers of the lots were selected.

Second. That the return showed affirmatively that the lots were sold to the appellant as an entirety, without the fee simple in each being first offered separately, thus making it apparent upon the face of the return that the alleged sale was inoperative and void as against the appellee.

In some of the States, and notably in some of the New England States, the sheriff has been, and presumably still is, required to make return of the manner in which the appraisers of real estate, taken in execution, may have been selected; but in this State so strict a rule, as regards sheriff's returns, has not been, and is not now, enforced.

On the contrary, it has been repeatedly held by this court that where the return of a sheriff is silent as to some matter imposed upon him in connection with the sale to which the return relates, it will be presumed that the sheriff did his duty, until it is otherwise shown by some appropriate proceeding. *Talbott* v. *Hale*, 72 Ind. 1; *Woolen* v. *Rockafeller*, *ante*, p. 208.

The recital, therefore, in the return before us that the sheriff had caused the lots to be appraised according to law, carried with it the implication that all the requirements of the law had been complied with in making the appraisement.

The general rule is, that where several tracts of land have been levied upon to satisfy an execution, a sale of them *in solido*, without first offering them separately, can not be sustained; but to avoid such a sale it must be affirmatively shown that such tracts were not first separately offered. Such sales are usually "voidable" only, and not "void," as they are very frequently denominated.

There is some apparent confusion in the decided cases in the application of the above general rule, but that confusion arises we think more out of a failure to observe the distinction between collateral attacks on such sales, and direct proceedings to set them aside, than from any other cause. All the presumptions are indulged in favor of a sheriff's sale, until it is attacked by affirmative evidence in a direct proceeding to set it aside. *Jones* v. *The Kokomo Building Ass'n*, 77 Ind. 340. When, therefore, a sheriff, in his return of a sale of several tracts of land for a gross sum, says nothing as to the particular manner in which the several tracts were offered for sale, it will be presumed that he conducted the sale in the manner required by law. Rorer Judicial Sales, section 776; *Love* v. *Cherry*, 24 Iowa, 204; *Stotsenburg* v. *Same*, 75 Ind. 538; *Weaver* v. *Guyer*, 59 Ind. 195. Our conclusion, consequently, is that the court below erred in refusing to admit the sheriff's return offered in evidence in this case, and that the error was one for which the judgment will have to be reversed.

No specific objection is pointed out, either to the sheriff's certificate of sale, or to the sheriff's deed. As they rested on the sheriff's return, we assume that they were improperly excluded. The certificate of sale was not a material link in the appellant's chain of title in this particular case, and hence no material injury resulted from its exclusion.

Some questions are made upon certain oral testimony, which was introduced, but as those questions will probably not arise again upon another trial, and especially not in the same form as before, we will not consider them now.

As to the conclusiveness of a sheriff's return upon parties and privies, as well as strangers, see Freeman on Executions, secs. 363, 364 and 365; also, *Splahn* v. *Gillespie*, 48 Ind. 397.

Judgment reversed, with costs, and the cause remanded for a new trial.

No. 8966.

81 304
134 308
81 304
146 440

Ramsey et al. v. The Rushville and Milroy Gravel Road Company.

Supreme Court.—*Practice.*—*Assignment of Errors.*—Matters constituting causes for a new trial do not constitute proper assignments of error, and, if assigned as independent errors, present no question for the decision of the Supreme Court.

Negligence.—*Injuries to Person.*—*Contributory Negligence.*—*Question of Fact.*—In a suit against a gravel road company to recover damages for injuries to the plaintiff, resulting, as alleged, from obstructions in, and the bad repair of, the defendant's road, the question as to whether or not the plaintiff's negligence contributed to the alleged injuries, is a question of fact, and, as such, is properly left to the jury.

Same.—*Obstructions in Roadway.*—*Evidence.*—In such a suit, where the plaintiff's injuries were received by the overturning of his buggy, caused, as claimed, by obstructions in the defendant's roadway, the testimony of witnesses, that in attempting to pass the same obstructions by driving around them, within a few days of the time, and at or near the same place, when and where the plaintiff's buggy was overturned, their sleighs, though driven in a careful manner, were also overturned, was outside of the issues in the case, and incompetent evidence.

Same.—*Necessary Deviation.*—*Ordinary Care.*—If the travelled portion of the roadway is obstructed or dangerous, making it necessary for a traveller to deviate therefrom, he must use ordinary care in making such deviation; for, in the absence of such care, the road corporation will not be liable for injuries sustained by reason of the obstruction. Ordinary care would prevent a traveller, in deviating from the roadway to avoid an obstruction, from driving upon ground so sideling as to appear dangerous to a prudent man.

From the Rush Circuit Court.

C. Cambern, J. J. Spann and —— *Thomas*, for appellants.

B. L. Smith, W. A. Cullen and *G. B. Sleeth*, for appellee.

Howk, J.—In this case, the appellants sued the appellee in a complaint of a single paragraph, in substance, as follows:

"Ann M. Ramsey and Eugenius Ramsey, who is the husband of said Ann M., plaintiffs, complain of the Rushville and Milroy Gravel Road Company, defendant, and say the defendant is a corporation organized under an act authorizing the construction of plank, macadamized and gravel roads, ap-

proved May 12th, 1852, and the amendments thereto, and as such was the owner of a gravel road leading from Rushville to Milroy in said county, which was used and travelled as a public highway, and on which defendant collected toll for such travel; that on the 14th day of January, 1879, the defendant permitted said road to get out of repair, and permitted the same to remain out of repair and travel obstructed for more than three weeks by permitting snow and ice to accumulate thereon, and form a drift four feet in depth and seventy-five yards in length, extending the entire width of the travelled portion of said road; that said defendant suffered said obstruction to remain on said road for three weeks as aforesaid, although it had full notice of the condition of said road, and of its condition on said 14th day of January, 1879; that on the 14th day of January, 1879, the plaintiffs were driving in a buggy along said road; that when they came to said obstruction they were compelled to drive around the same in order to avoid it and in order to proceed on their journey; and in so attempting to pass said obstruction plaintiffs' buggy was overturned and they were thrown violently on the ground, whereby said Ann M. sustained great and serious injury in having her collar-bone broken, and in being otherwise badly bruised; that said plaintiffs were wholly ignorant of the condition of said road, and said injuries were not the result of any negligence on the part of plaintiffs, or either of them, but wholly of the negligence of the defendant in permitting said road to become and remain obstructed as aforesaid. Plaintiffs further say that said Ann M. has been confined to her bed by reason of said injuries for more than two weeks, and has suffered great bodily and mental pain therefrom. Wherefore plaintiffs say they have sustained damages in the sum of three thousand dollars, for which they demand judgment, and for all other proper relief."

The appellee answered by a general denial of the complaint. The issues joined were tried by a jury, and a general verdict was returned for the appellee. The appellants' motion for a

new trial having been overruled, and their exceptions saved to such ruling, the court rendered judgment for the appellee on the general verdict, for its costs, and that the appellants take nothing by their suit herein.

The only error properly assigned by the appellants, in this court, is the decision of the circuit court in overruling their motion for a new trial. They have also assigned as errors several matters which would have constituted proper causes for a new trial, in the motion therefor addressed to the court below; but they are improperly assigned as errors in this court. It is well settled that such assignments of error will present no questions for the decision of this court. *Freeze* v. *DePuy*, 57 Ind. 188; *Walls* v. *The Anderson, etc., R. R. Co.*, 60 Ind. 56; *Todd* v. *Jackson*, 75 Ind. 272.

The evidence in the record, we think, fairly sustains the allegations of the appellants' complaint, in regard to the appellee's ownership of the gravel road described therein, the use of and travel over said road as a public highway, and the exaction and collection of toll by the appellee, for such use and travel. The evidence also tended to show, that on the 14th day of January, 1879, the appellee's road was, and had been for about three weeks prior to that day, seriously obstructed and out of repair, by reason of a heavy accumulation of drifted snow and ice, in and upon its roadway; that, on the day named, the appellants were travelling on and over the appellee's road in a buggy drawn by a single horse, and that in attempting to pass the obstruction in the appellee's road, by driving around it, the appellants' buggy was overturned, and they were violently thrown upon the ground, and by means thereof the appellant Ann M. Ramsey was injured as alleged in the complaint.

On the trial of the cause in the circuit court, the turning point of the controversy was upon the issue joined on the allegation of the complaint, that the injuries of Ann M. Ramsey "were not the result of any negligence on the part of plaintiffs, or either of them, but wholly of the negligence of

the defendant in permitting said road to become and remain obstructed as aforesaid." It was claimed by the appellee, that the appellants contributed by their own negligence to the injuries complained of. There was evidence introduced on the trial which tended to show contributory negligence on the part of the appellants, but, on this point, the evidence was conflicting. The court of its own motion instructed the jury upon this point, in substance, that if they should find from the evidence that the conduct of the appellants, or of either of them, contributed to the accident, they must find for the appellee; and the question as to whether the appellants, or either of them, were or were not guilty of contributory negligence, the court left to the jury as a question of fact. In *The Louisville, etc., R. W. Co.* v. *Richardson*, 66 Ind. 43, this court approved of the following instruction, which had been given the jury by the trial court, upon the point now under consideration: "Also, I leave it to you as a question of fact, whether there was negligence in the plaintiff, that invited or contributed to the injury complained of." See, also, *Gagg* v. *Vetter*, 41 Ind. 228. In the case at bar, we are of the opinion, that the court did not err in leaving to the jury the question as to whether the negligence of the appellants, or of either of them, did or did not contribute to the injuries of Ann M. Ramsey, as a question of fact.

It is claimed by the appellants, that the court erred in excluding from the jury the testimony of two witnesses, produced by them. By each of these witnesses the appellants offered to prove, that, within a few days of the day on which the appellants' buggy was overturned, he, the witness, was driving a sleigh over the appellee's road, and that, in attempting to pass the same obstruction in the road mentioned in the complaint, by driving around it, and while driving in a careful manner, his sleigh was overturned at or near the same place where the appellants' buggy was overturned. This offered evidence was outside of and foreign to the issues in this cause, and, as it seems to us, was clearly incompetent. The appellee's

objection to the evidence, on this ground, was well taken and correctly sustained, and the evidence was properly excluded.

At the request of the appellee, the court gave the jury trying the cause, the following instruction:

"1st. If by the action of the elements (snow and wind), and without any fault of the corporation, its officers or agents, a snow bank was formed on the line of the defendant's road three or four feet in depth and forty rods long, and the plaintiff, while travelling upon said road, came to it and undertook to pass over it and through it, and sustained injuries in so doing, then the corporation would be liable, provided it was shown to be an obstruction, and the company had knowledge of it, or it had remained a sufficient length of time to imply a knowledge of it; but if the evidence shows that when the plaintiffs came to it, they did not attempt to pass over it or through it, but of their own choice attempted to drive around it, and in so doing drove upon a piece of ground so sideling as would appear to a prudent man dangerous, and thus upset their buggy, thereby sustaining the injuries complained of, the plaintiffs could not recover."

The appellants' counsel earnestly insist that the concluding sentence of this instruction is not the law, and is in direct conflict with the authorities. In support of their position on this point, counsel have referred us to Wharton on Negligence, section 997; but an examination of that section will show very clearly, we think, that it treats of a subject-matter so widely different from the one presented in the case now before us, that it can not be regarded as an authority in point. In section 968, of Wharton on Negligence, it is impliedly declared, that if the travelled portion of the highway is obstructed or dangerous, making it necessary for a traveller to deviate therefrom, he must, in so doing, use ordinary care, for, if in so deviating he does not use such care, the road corporation will not be liable for injuries sustained by reason of such obstruction. Ordinary care would prevent a traveller, in deviating from a highway to avoid an obstruction therein, from driving

upon a piece of ground so sideling as would appear dangerous to a prudent man. This is substantially what the court told the jury, in the concluding sentence of the instruction quoted, and it seems to be the law.

The verdict of the jury was fairly sustained by the evidence, on every material point, and it was not contrary to law.

Upon the whole case, our conclusion is that the court committed no error in overruling the appellants' motion for a new trial.

The judgment is affirmed, at the appellants' costs.

No. 9211.

Ex Parte Mitchell.

Supreme Court.—*Record.—Allowance to Clerk.*—Where a county clerk presents a claim for special services for a term of court, but offers no evidence in support thereof, and no finding is made that the services were rendered, and the court refuses to allow the claim, no question is presented by the record to the Supreme Court, on appeal.

From the Floyd Circuit Court.

J. H. Stotsenburg, for appellant.

Best, C.—At the September term, 1880, of the Floyd Circuit Court, the following bill of expenses was submitted to the judge of said court for allowance:

"Floyd county, to John B. Mitchell, Clerk, Dr.

"Clerk's bill of expenses for the September term of the Floyd Circuit Court:

"1. To making up dockets, 291 cases @ 60c	$174.60
"2. To report of letters of administration and guardianships issued in vacation, and entering same .	15.00
"3. To report wherein reports are due in estates and guardianships	25.00

"4. To reports wherein inventories are due in estates	20.00
"5. To issuing grand jury subpœnas (100@8c) . .	8.00
"6. To issuing venire for grand and petit jurors . .	1.00
"7. To entering on record grand jury reports of indictments returned into court (9@50c)	4.50
"8. To recording indictments (26@50c)	13.00
"9. To entering and certifying to auditor grand jury reports on jail	2.00
"10. To entering court allowances (4@50c)	2.00
"11. To copying and certifying court allowances to auditor	14.00
"12. To services rendered in State cases lost by State	100.00
"13. To postal expenses	6.00
"14. To express charges	.50
	$385.60

"I certify the above to be correct.

"J. B. MITCHELL, Clerk."

The court, after an examination of the claim, allowed the 5th, 14th, and $1 of the 11th item, and refused to allow the residue, to which refusal the appellant excepted. From this order this appeal is taken, and the error assigned is the refusal of the court to allow and order paid the residue of appellant's claim.

No evidence was offered in support of appellant's claim, and no finding was made that appellant had rendered the services or expended the money mentioned in his statement. In this condition of the record, no question is presented. In the absence of a showing or a finding, the questions sought to be raised are mere abstract questions.

For these reasons, the order made by the court should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things affirmed, at the appellant's costs.

No. 9235.

CHRISMAN ET AL. *v.* CHENOWETH.

PLEADING.—*Mortgage.—Parties.*—A complaint by A., in the usual form, to foreclose a mortgage given to A. and B. to secure a note payable to A., is not bad for want of sufficient facts. If objectionable at all, it is for want of proper parties.

SAME.—*Answer.—Reply.*—A paragraph of reply to two paragraphs of answer, which avers nothing in denial or avoidance of one of them, is bad on demurrer.

SAME.—*Vendor and Purchaser.—Title Bond.—Breach of Warranty.—Eviction. Promissory Note.—Consideration.*—To a complaint to foreclose a mortgage the answer was in two paragraphs: 1. That the note was for the last instalment of the purchase-money of the land mortgaged; that the vendor contracted by bond to execute a warranty deed upon full payment of the purchase-money, which had not been tendered; and by paramount title the purchaser had been evicted of one-third of the land. 2. As to one-third of the note, that the consideration has failed because of the eviction of the purchaser from a third of the land by title paramount; that a deed for the vendor's "right, title and interest" in the land was tendered, which the purchaser was persuaded to accept, but not in full discharge of the bond. A reply to both, denying under oath the execution of the bond, and that the deed was executed and accepted and recorded by the purchaser, who has ever since claimed under it, is good on demurrer.

From the Warren Circuit Court.

J. McCabe and *C. M. McCabe*, for appellants.

J. M. Rabb, for appellee.

BICKNELL, C. C.—This was a suit upon a note and mortgage, given to secure the payment of the purchase-money of land.

The appellee, the payee of the note, was the plaintiff; of the defendants, Isaac Chrisman was the maker of the note; he and his wife were the mortgagors; Swisher and wife were purchasers subject to the mortgage, and the other defendants were junior judgment creditors.

There was a trial by the court and a finding for the plaintiff for the amount of the note and interest, and for foreclosure of the mortgage. The defendants Isaac Chrisman and

wife, and Harrison C. Swisher and wife, appealed from the judgment rendered on the finding; the other defendants were defaulted, they decline to join in the appeal, and their names are stricken from the record.

The appellants assign errors jointly as follows:

1st. In overruling the demurrers to the complaint.

2d. In overruling the demurrers to the first paragraph of the reply.

3d. In overruling the demurrers to the second paragraph of the reply.

One objection urged against the complaint is, that although the note is payable to the appellee, and the mortgage is averred to have been executed to him, yet the exhibit shows that it was executed to him and his wife jointly.

The mortgage was executed to secure to the appellee the payment of the note; the demurrer was for want of sufficient facts, etc.; there was no objection for want of proper parties.

Another objection is, that the complaint, instead of stating that Chrisman and wife executed the mortgage, states that they joined in executing it.

Another objection is, that the complaint does not show that Mrs. Swisher bought the land after the mortgage was recorded. The averment is, that the mortgage was recorded, and that Mrs. Swisher bought the land "since" the recording. The demurrers to the complaint were properly overruled.

The answer of the defendants Chrisman and wife, and Swisher and wife, was in two paragraphs:

First. That the note was given for the last instalment of the purchase-money; that the vendor gave a bond conditioned for the execution of a good and sufficient warranty deed upon full payment of the purchase-money; that no such deed has been tendered, or can be tendered, and that the purchaser has been evicted from one-third of the land by a paramount title.

Second. That as to one-third of the note the consideration has failed, because the purchaser has been evicted from one-third of the land by paramount title; that the vendor exe-

onted a deed to the purchaser, and sent it to his agent for delivery to the purchaser; that she did not accept it in full discharge of the bond, but that said agent being a lawyer, and she ignorant of such matters, he persuaded her to accept it, by representing that it was a good and sufficient warranty deed. Copies of the bond and deed are annexed to the answer; the bond is made part of the first defence; the deed is made part of the second defence.

The first paragraph of the answer contains two distinct matters, viz.: The failure to tender a deed, and the eviction.

The second paragraph of the answer contains two distinct matters, viz.: The eviction from part of the land, and the allegations in reference to the tender of the deed, and the circumstances under which it was accepted.

The bond recites a sale, by Chenoweth and wife to Elizabeth Chrisman, of the undivided three-eighths of said land, for $3,000, payable in instalments, the last of which is the note in suit, and that she is to have possession from the date of the bond. The condition of the bond is, that Chenoweth and wife shall, upon reasonable request, execute to said Elizabeth, her heirs and assigns, a good and sufficient warranty deed, in fee simple, for said premises. The bond is dated November 8th, 1876, and is signed: "Thomas J. Chenoweth, (Seal) Louisa Chenoweth, (Seal) By Alvin High, their Agent, (Seal).

The deed is not a deed for said premises; it conveys "all our right, title and interest in the land," instead of three-eighths of it, and proceeds thus: "It being the intent hereof to convey all our interest and right by us now held in said lands, whether said interest be as heirs of Peter Chrisman and Sarah Chrisman, deceased, or as grantees of the heirs of said deceased, or as heirs of John W. Chrisman, if he be deceased leaving no heirs, but this conveyance is made subject to any and all taxes or tax liens that may have accrued on said lands, or our interest therein." The deed is dated and acknowledged on December 5th, 1876.

The eviction alleged in the answer is, that one-third of the premises belonged to Sarah, wife of Peter Chrisman, and that when she died that one-third would have descended to Chenoweth's wife, but that the administrator of said Sarah Chrisman sold the same to make assets to pay said Sarah's debts, and Elizabeth and her husband were evicted therefrom. The two paragraphs of the reply were pleaded to the entire answer.

The first paragraph of the reply averred that plaintiff owned an undivided interest in the premises by purchase, and his wife owned an undivided interest therein as heir, of Peter and Sarah Chrisman, and that the defendant Isaac Chrisman also owned an undivided interest in the premises; that the land had been in Isaac Chrisman's possession for several years; that on October 18th, 1876, the plaintiff authorized his agent, Alvin High, to sell to Isaac Chrisman, all the right, title and interest of himself and wife in said lands for $3,000, on certain terms, but never authorized him to sell the undivided three-eighths of said land, nor to execute a title bond therefor, or for any specific interest whatever, in his and his wife's names; that he had no knowledge of said title bond and never made it nor authorized it; that said agent sent to plaintiff and wife for execution a warranty deed to said Elizabeth Chrisman for three-eighths of said land, but plaintiff would not sign it; that plaintiff executed, instead thereof, the deed exhibited in said answer, which deed conveyed the precise interest he had authorized said High to sell; that said Isaac Chrisman and wife accepted said deed and placed it on record, and have ever since claimed the land under said deed, and have never offered to return it to plaintiff. This paragraph of the reply was duly verified. We think this was a sufficient reply to all the material averments of the entire answer. There was no error in overruling the demurrer to it.

The second paragraph of the reply avers a tenancy in common as alleged in the first paragraph, and that Peter Chrisman died seized of said land, leaving Sarah Chrisman his widow, who died in December, 1873, leaving personal estate

of the value of $2,000 and debts not exceeding $800; that said Isaac Chrisman took possession of said personal estate and undertook to settle it without administration; that at the date of said sale there had been no letters of administration upon said estate; that said sale was really a sale to Isaac Chrisman, who paid the money, but took the deed in his wife's name; that at the time of said sale he had in his hands much more of the personal estate of said Sarah Chrisman than was required to pay all her debts, but he claimed there were no such debts and paid none of them, by reason whereof the creditors of said deceased were compelled to have an administrator appointed, and by reason of the failure of said Isaac Chrisman to pay over to said administrator the personalty of said deceased so in his possession, said administrator was compelled to sell said Sarah's interest in said land to make assets to pay her debts, and if there was any failure of title to any of the land sold by plaintiff, it occurred by reason of the wrongful conduct of said Isaac, the maker of the note sued on.

This second paragraph of reply, being pleaded to the entire answer, is insufficient, because it fails to respond to that part of the first defence, which alleges that the note was given for the last instalment of the purchase-money, and that no deed was tendered before suit brought. *Kernodle* v. *Caldwell*, 46 Ind. 153; *Kinsey* v. *The State, ex rel.*, 71 Ind. 32. The court erred in overruling the demurrer to the second paragraph of the reply, and for this error the judgment should be reversed.

Per Curiam.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and the same is hereby in all things reversed, at the costs of the appellee, and this cause is remanded with instructions to the court below to sustain the demurrer to the second paragraph of the reply.

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No. 9323.

The Johnston Harvester Company v. Bartley.

Sheriff's Return.—*Summons.*—A sheriff's return to process can not be set aside on motion supported by proof that it is false. It can not be thus contradicted.

Contract.—*Warranty, Breach of.—Pleading.*—A complaint for a breach of warranty of a machine to be "fit for cutting wheat and grass, and that it will do first-class work," alleging for breach, generally, that "it was not fit for and would not do first-class work," and was worthless to the plaintiff, is not sufficient on demurrer. The nature and particulars of the breach should be specified, and it should be shown that the machine was properly tested within a reasonable time, by alleging the facts constituting the test and the time thereof.

Same.—*Oral and Written Warranty.—Evidence.—Presumption.*—Where, upon a complaint for breach of an oral contract of warranty, it appears in evidence that the contract was in the first place oral, but finally reduced to writing, there can be no recovery, the preceding oral negotiations being presumed to be merged in the written instrument.

Principal and Agent.—*Declarations.—Evidence.*—Agency can not, in a suit against the principal, be proven by the declarations of the agent.

From the Noble Circuit Court.

T. M. Eells, for appellant.

J. A. Campbell and *L. W. Welker*, for appellee.

Elliott, J.—The sheriff received the summons issued in this case on the 20th day of August, 1879, and on the 30th day of the month made the following return: "Served the within named Johnston Harvester Company by leaving a true copy at the last and usual place of residence of William R. Knox, an agent of said company." The appellants entered a special appearance, and moved to set aside the return, upon the ground that Knox was a resident of Howard county. The motion was rightly denied. The defendant was not at liberty to contradict the sheriff's return. It is well settled that the return of a sheriff is conclusive upon the parties to the action. *Splahn* v. *Gillespie*, 48 Ind. 397; *The State* v. *Davis*, 73 Ind. 359; *Hume* v. *Conduitt*, 76 Ind. 598; *Hite* v. *Fisher*, 76 Ind. 231.

The complaint is badly drawn. It alleges that the appellant sold to the appellee a Johnston Harvester and a John-

ston Mower, and warranted them to be fit for cutting wheat and grass, and that they would do first-class work. The breach of the warranty is not sufficiently alleged. It is not shown that the machines were not capable of doing the work warranted. There is, it is true, a general allegation that they were not fit for and would not do first-class work, but this is not sufficient. In a warranty such as that declared upon, it is necessary, as said in *Booher* v. *Goldsborough*, 44 Ind. 490, to show "the nature and particulars of its breach." There are, perhaps, cases where a general negation of the warranty would be sufficient, but in cases of this character it should be specific. Where the warranty is a general one, it is proper to state the breach generally, but where it is a restricted or qualified one, it is otherwise. *Leeper* v. *Shawman*, 12 Ind. 463.

The complaint alleges that the machines "are worthless to the plaintiff." This is not sufficient. They may be without value to the appellee, and yet of the full value represented. The question is not to be determined by the wants or demands of the purchaser. It must be shown, by proper allegations, that the thing bought is either without value, or of a less value than it would have been if it had corresponded to the warranty. *Neidefer* v. *Chastain*, 71 Ind. 363; *Louden* v. *Birt*, 4 Ind. 566.

In an action for a breach of warranty, it is necessary to show that the article purchased was properly tested within a reasonable time after the purchase. It is not enough to state mere conclusions of law, but facts, showing the test and the time within which it was made, must be pleaded. *The Lafayette Agricultural Works* v. *Phillips*, 47 Ind. 259; *Robinson Machine Works* v. *Chandler*, 56 Ind. 575. The complaint before us does not state such facts as show that the machines were tested within a reasonable time after their purchase.

It appears from the record that the first warranty was an oral one; that subsequently it was reduced to writing. We think the written instrument must be deemed to contain the contract of the parties. It is a familiar rule, that where par-

ties put their contract in writing, it will be regarded as expressing the whole contract, and parol evidence can not be given to alter or contradict it. Where the terms of a contract are embodied in a written instrument, the preceding oral negotiations are presumed to be merged in it. *Oiler* v. *Gard*, 23 Ind. 212. There is nothing in the present case to rebut this presumption, and it must prevail. The only evidence offered by the appellee was parol, and this is not sufficient to entitle him to a recovery, for the reason that the written instrument shown to have been executed and in existence was the foundation of the only right of action he possessed. When the existence of the written contract was proved, as it was by the appellee himself, it appeared as the best evidence, and secondary evidence should not have been received.

A plaintiff can not sue upon one theory and recover upon another. He can not declare upon a verbal contract and recover upon a written one. *Morgan* v. *Gaar, Scott & Co.*, 64 Ind. 213. The appellee could not recover in this case, had he proved the written contract, for the reason that he had declared upon a verbal one. He can not recover upon the verbal contract, for the reason that he proved that a written one was executed, and this merged all preceding oral stipulations. This case falls bodily within the principle declared and enforced in *McClure* v. *Jeffrey*, 8 Ind. 79.

The declarations of an agent are not competent to establish the existence of the relation of principal and agent. The court erred in admitting the declarations of Knox, that he was the agent of the appellant.

It is true, as appellee's counsel assert, that the general rule is that the declarations of an agent, made during a transaction and forming part of the *res gestæ*, are admissible against his principal, but this rule does not extend so far as to permit the existence of the agency to be proved by such declarations. *Union Central L. Ins. Co.* v. *Thomas*, 46 Ind. 44; *Tomlinson* v. *Collett*, 3 Blackf. 436; 2 Whart. Ev., section 1183.

Judgment reversed.

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No. 8710.

RAILSBACK *v.* WALKE.

REAL ESTATE, ACTION TO RECOVER.—*Complaint.—Description of Premises.—Presumption.*—If the description of the premises in a complaint in ejectment contains no apparent uncertainty, the pleading will be upheld on demurrer. The court will not indulge in conjecture, or in the presumption of facts not stated, for the purpose of making the description uncertain.

SAME.—*Answer.—Lease.—Statute of Frauds.*—An answer to a complaint in ejectment in the usual form, to the effect that the defendant had been the owner and in possession, but had been sold out by the sheriff, and that, in consideration of the surrender by the defendant of an obligation which he held against the purchaser, the latter had leased the land to the defendant for the period of five years, and that he had been in possession and had cultivated the land for one year only, is not good, because of the statute of frauds which requires leases for more than three years to be in writing.

SAME.—*Landlord and Tenant.*—A special answer, to a complaint in ejectment, which sets up a right to occupy as tenant, must show that the tenancy had not been terminated before the commencement of the action.

SAME.—*Part Performance.—Consideration.*—The remaining of a party in possession, under a parol lease of land for more than three years, payment of the consideration of the lease and cultivation of the land are not such part performance as to take the contract out of the statute.

SAME.—*Parol Lease for more than Three Years.*—The tenant who takes possession under a parol lease for a term longer than three years, is not a trespasser, but, *it seems*, a tenant from year to year.

PRACTICE.—*Objections and Exceptions.—Presumption.*—The specific grounds of objection to any action or ruling of the trial court must be stated (and exceptions taken) at the time, and not left to inference from a general history of the proceedings; the presumption being in favor of such court until error is plainly shown by the record made up in accordance with the rules of practice.

SAME.—*Filing of Papers Without Attention of Court.—Affidavit for Change of Venue.*—Parties have no right in open court, to file an affidavit for change of venue or other paper, without calling the attention of the court thereto. *Quære*, whether an affidavit for a change from the judge can be so interposed as to prevent the announcement of a decision on a matter already considered, the judge being in the act of making the announcement.

SAME.—*New Trial as of Right.—Evidence.—Payment of Costs.*—A motion for a new trial as matter of right, on payment of costs, must be supported by proof of the payment.

From the Wayne Circuit Court.

W. A. Bickle, for appellant.
T. J. Study, for appellee.

WOODS, J.—The appellant has assigned error upon the overruling of his demurrer to the complaint, the sustaining of the appellee's demurrer to his answer, the action of the court in proceeding in the cause after the filing of an affidavit for a change of venue, the appointing of an attorney to try the cause, and the refusal to grant the appellant a new trial on payment of costs.

The action was for the recovery of possession of real estate; and the only objection made to the complaint is that it does not give a sufficient description of the property. The following is the description: "A tract of land in Wayne county, etc., to wit, a part of fractional section No. one, etc., bounded as follows, to wit, on the north by the Wayne county turnpike, on the west by a county road, on the east by a county road, and said land to extend far enough south to contain 150 acres." There is no apparent uncertainty in these boundaries, and, in ruling upon a demurrer, the court will not indulge in conjecture for the purpose of making doubtful or equivocal that which seems to be definite.

The answer, which the court held insufficient, is in substance, as follows:

That the appellant had been the owner in fee and continuously in possession of the land for more than forty years, when upon foreclosure of a mortgage it was sold by the sheriff, and thereafter Lycurgus Railsback, a son of the defendant, obtained a deed for the land by and through the assignee of the certificate of purchase from the vendee of the sheriff, and the said Lycurgus being indebted to the defendant in the sum of $5,000, with ten years interest thereon, for which the defendant held his notes, it was then and there agreed between said Lycurgus, one Fabius Flemming, a son-in-law of the defendant, and the defendant, that if the defendant, who was then and still is old and infirm, would surrender to said Ly-

curgus all said notes and forever discharge him from liability thereon, and for said debt, the defendant should continue in undisturbed possession of said premises for five years, and have for his own use all the uses, rents and profits thereof; that said Lycurgus never was in possession nor had instituted any proceedings to acquire such possession, but the same was, as it had been, in the possession of the defendant as aforesaid; that after said agreement the defendant surrendered to said Lycurgus said notes and gave up all said claims and has continued from thenceforward to occupy and cultivate said land for one season, and there still remain four years of possession to be enjoyed by him; that afterwards, while the defendant was in the personal, open, notorious and peaceable possession of the premises, said Lycurgus, by a quitclaim deed, conveyed said real estate to the plaintiff, who, before purchasing, had actual notice of the defendant's possession, claim and right to the property.

The questions arising upon the answer and discussed by counsel are, whether the contract set up in the plea is within the statute of frauds, and whether, if so, such part performance is shown as to take it out of the statute.

The act concerning conveyances provides, that "Conveyances of land, or any interest therein, shall be by deed in writing, subscribed, sealed and duly acknowledged by the grantor, or by his attorney; except *bona fide* leases for a term not exceeding three years." 1 R. S. 1876, p. 362, section 4; R. S. 1881, section 2919.

The statute of frauds provides, "That no action shall be brought * * *

"*Fourth.* Upon any contract for the sale of land.

"*Fifth.* Upon any agreement that is not to be performed within one year from the making thereof.

"Unless the promise, contract, or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized;

excepting, however, leases not exceeding the term of three years." 1 R. S. 1876, p. 503, section 1; R. S. 1881, section 4904.

The result of the authorities seems to be that the fifth clause of the statute has no reference to contracts concerning real estate. *Baynes* v. *Chastain*, 68 Ind. 376; *Fall* v. *Hazelrigg*, 45 Ind. 576; *Sobey* v. *Brisbee*, 20 Iowa, 105; *Young* v. *Dake*, 5 N. Y. 463; *Wilson* v. *Martin*, 1 Denio, 602.

It is the fourth clause alone which affects such contracts, and the exception concerning leases being a modification of this clause, would be found more appropriately at the end of it, as is the corresponding provision in the Iowa statute. *Sobey* v. *Brisbee*, *supra*.

It follows, from these provisions, that a lease for a term exceeding three years must be in writing; but, as contracts within the fourth clause may, by part performance, be taken out of the operation of the statute, leases for more than three years may be in like manner made effective as the basis for a cause of action or defence.

The contract pleaded by the appellant is clearly a lease, and being for five years was, when made, within the statute. Do the facts alleged take it out?

The position of the appellee is, that the answer does not show a taking of possession by the lessee, under and in pursuance of the contract, but only a continuation of the possession which he already had as owner and mortgagor of the land, and that the surrender of the notes which he held against his son was only a payment of the consideration,—which does not constitute such part performance as affects the operation of the statute. The following authorities are cited in support of this position: *Johnston* v. *Glancy*, 4 Blackf. 94 (28 Am. Dec. 45); *Pearson* v. *East*, 36 Ind. 27; *Moore* v. *Higbee*, 45 Ind. 487; *Johns* v. *Johns*, 67 Ind. 440; *Carlisle* v. *Brennan*, 67 Ind. 12; *Neal* v. *Neal*, 69 Ind. 419; *Armstrong* v. *Kattenhorn*, 11 Ohio, 265; *Crawford* v. *Wick*, 18 Ohio St. 190; *Mahana* v. *Blunt*, 20 Iowa, 142; *Knoll* v. *Harvey*, 19 Wis. 99; *Wood* v. *Thornly*, 58 Ill. 464; *Padfield* v. *Padfield*, 92 Ill. 198;

Browne Stat. Frauds, 4th ed., sections 472, 476, 482; Pomeroy Con., sections 116 and 123; 5 Wait's Actions and Defenses, sec. 6, pp. 800 and 801; Story Eq. Jur., secs. 762–3.

Counsel for the appellant, on the other hand, contends that while the appellant was yet in the actual possession, his title and right of possession had been extinguished by the sheriff's deed, so that he was, in fact, only a trespasser, liable to an immediate action of ejectment, and, consequently, that his continuing in the possession and cultivation of the land for a period of one year after and under the contract, was such possession as was fairly referable to and explainable only by reference to the contract, and was therefore sufficient in equity to avoid the force of the statute. In support of this view are cited: *Smith* v. *Allen*, 1 Blackf. 22; *Johnston* v. *Glancy*, 4 Blackf. 94; *Moreland* v. *Lemasters*, 4 Blackf. 383; *Doe* v. *Horn*, 1 Ind. 363; *Neal* v. *Neal*, 69 Ind. 419, 423; *Billington* v. *Welsh*, 5 Binney (Pa.) 129; *Meehan* v. *Williams*, 48 Pa. St. 238; Fry Spec. Perf., section 396; Dart Vendors, 477; Story Eq. Jur., sections 761-3; 1 Hilliard Vendors, 147; *Dale* v. *Hamilton*, 5 Hare, 369.

The mere continuing of the appellant in possession, though without an agreement therefor he may have been liable to be treated as a trespasser, was not in our judgment, a sufficient part performance, and the averment concerning the cultivation of the land is too general to be available. Assuming, without deciding, that if the answer had shown the nature and uses of the property, as that it was farming land, and that with the knowledge and consent of his lessor (before he quit-claimed to the plaintiff), the appellant had prepared the ground and planted valuable crops or if the property had consisted of buildings, that he had made expensive repairs, or other outlays, which a mere trespasser would not make, and the benefit of which he could not get unless under some contract for the rightful possession, it might be deemed enough to take the case out of the statute. The answer makes no such case. It does not appear on the facts stated, that if at any moment,

after the making of the alleged contract, the appellant had been turned out, he could have suffered any substantial loss or legal injury.

It may be remarked here, that it is not clear, as counsel for the appellant has seemed to assume, that the appellant was a trespasser, unless his lease was good. It has been decided that though a parol lease for a term longer than three years, is within the statute of frauds, yet, if the tenant enters, it is a tenancy from year to year, regulated by the parol agreement, except as to the length of the term. *The People* v. *Rickert*, 8 Cowen, 226; *Tress* v. *Savage*, 4 Ellis & B. 36.

While, therefore, the agreement set up in the answer was not valid or binding because not in writing, the making of it, under the circumstances, operated as the consent of the lessor to the continued possession of the appellant, and, under section 2 of the act concerning landlord and tenant, 2 R. S. 1876, p. 338, R. S. 1881, section 5208, such possession became, as it would seem, a tenancy from year to year.

The answer, however, is not good, on account of the fact that it shows this tenancy, assuming that it does show it, because it does not show but that the tenancy had been terminated by the giving of the requisite notice, or otherwise. A special answer to a complaint in ejectment, which sets up a right to occupy as tenant, must show that the tenancy had not been terminated before the commencement of the action. This is the rule of pleading, whatever may be the rule of evidence.

The surrender of his notes against his son by the appellant was only a payment of the consideration of the alleged lease, and did not constitute part performance, and, upon the facts stated, the appellant is entitled to reclaim the notes, and to recover the amount due upon them.

In reference to the application for a change of venue, and to the closing of the rule for an answer, the facts, as stated in the bill of exceptions, were as follows: That on the 17th day of March, 1880, the defendant filed with the clerk in open court, while other business was pending before the court,

but without the knowledge of the judge of the court or the plaintiff's attorney, the following affidavit for a change of venue from the judge, to wit: (here follows affidavit); and thereafter, on the calling of said cause for issue, the court having previously, to wit, on the 15th day of March, 1880, granted defendant leave to amend his answer, to which a demurrer had been sustained, without naming any time in which the amendment should be made, the plaintiff, before he or the judge of the court knew that the affidavit was on file, moved the court to close the rule against the defendant for want of an answer, upon which the defendant informed the court that the motion for a change of venue had been put on file before the motion was made to close the rule, and the defendant then moved the court to grant said change of judge and venue; and the plaintiff then read in open court the affidavit for the change and insisted on the motion to close the rule; and the defendant informed the court that in consequence of being constantly engaged in the trial of a cause for the whole of the past week, he had not amended the answer. The court sustained the motion to close the rule, did close it, and immediately thereafter announced that the change of venue would be granted to Judge Polk, to which judgment and action of the court in closing said rule the defendant at the time objected and excepted.

Certain rules of the court are set out in the bill of exceptions, but, as they have no essential bearing on the question presented, we do not copy them.

The appellant, it will be observed, objected and excepted to the action of the court in closing the rule against him for an answer. The grounds of exception he did not state. From the history of what preceded the ruling, aided by the argument of his counsel here, we might readily conjecture what grounds of objection were in his mind, but the rule of practice is, and its wisdom is justified by experience, that the specific grounds of objection and exception to a ruling must

have been stated at the time the ruling was made, and the bill of exceptions must show what they were.

Upon the record before us it can not be determined whether, when the ruling was made, the objection to it was based on the ground that counsel had not, on account of his employment in the trial referred to, had reasonable time to prepare an amended answer, or on the ground that because no time was named in the order granting leave to amend, the court had no right, under its rules or under the law, to close the rule without allowing further reasonable time, or on the ground that after notice of the affidavit for a change of venue from the judge, the court had no power to act, except to grant the change, or whether upon any or all these grounds.

Counsel appeals to our knowledge of the courtesies which must prevail between counsel engaged in the conduct of causes. But cases can not be decided by rules of courtesy.

The presumptions are in favor of the action of the court, until by the record it is plain that it erred.

The record does not show in this case that counsel had in truth been so employed as that he had not had reasonable time to amend his answer. He did not ask for an extension of time, or in any way indicate a desire or purpose to plead further. A general denial would have made all possible defences available. It would seem, therefore, that there is no just ground of complaint that the rule was closed, and, if there is any technical objection, it is because the motion for a change of judge was not allowed to intervene before the motion of the appellee was acted upon.

If the question arose in the record, it would be without even technical merit. Counsel had no right, in open court, to file the affidavit for a change of venue, or any other paper in a cause, without calling the court's attention thereto, so that the filing could be noted on the court docket. The orderly conduct of business requires this practice. The affidavit, therefore, had not been in fact filed, and so far as the record shows never was properly filed. The appellant, when the court was

about to act on the motion to close the rule, did not offer nor ask leave to file it, but simply notified the court of the previous effort at filing, and asked the court to grant him a change, but took no exception to the disregard of his request.

Whether, if the appellant had asked leave to file the affidavit and to interpose his motion for a change, the court would have been compelled to suspend its decision on another motion already under consideration, and give precedence to the motion for a change from the judge, we need not consider.

The appellant moved for a new trial as a matter of right, alleging, in his motion, that he had paid all costs; but the record contains no statement or evidence that he had in fact paid the costs. There is, therefore, no question before us in respect to this motion.

Error is assigned upon the appointment of an attorney to try the cause, but no exception was saved to the appointment.

Judgment affirmed, with costs.

No. 8615.

HAMILTON ET AL. *v.* PLAUT ET AL.

SPECIFIC PERFORMANCE.—*Title Bond.—Contract.—Mistake.—Statute of Limitations.—Vendor and Purchaser.*—Suit to compel a conveyance according to the conditions of a title bond. Cross complaint averring that the purchase-money was unpaid, alleging that a recital in the bond of payment was a mistake, and that the purchaser and her assignee were in possession, praying for a correction of the mistake, that an account be taken of the purchase-money due, and on payment that a conveyance be made by a commissioner, and for general relief. Answer to the cross complaint, the statute of limitations.

Held, that the cross complaint was good on demurrer, and the answer bad.

Held, also, that plaintiff, by suing for specific performance, waived the statute.

SAME.—*Estoppel.*—The recital of payment in a title bond for a deed for the purchase of real estate does not estop the obligor from averring, in a suit for a deed, the non-payment of the purchase-money.

From the Cass Circuit Court.

W. T. Wilson, G. C. Taber and *N. O. Ross*, for appellants.
D. P. Baldwin, for appellees.

MORRIS, C.—The appellees, on the 22d day of August, 1873, brought this suit against the appellants to enforce the performance of a contract for the sale of a lot in Taber's addition to the city of Logansport, making the heirs of Henry Bliss, by his first marriage, defendants below, for the reason that they refused to join with them as plaintiffs, alleging them to be the owners of something less than a third of said lot.

The complaint states that on the 14th day of March, 1854, Allen Hamilton and Cyrus Taber, being then in life, and the owners of the lot in controversy, executed a title bond, a copy of which is filed with .the complaint, agreeing to convey to Martha Bliss, the ancestor of the appellees, said lot for the sum of $500; that the said Martha took immediate possession of said lot, and remained seized of the same until her death, in the year 1871; that she left surviving her, her husband, Henry Bliss, and two children, of whom the appellee Martha Plaut was one; that the other, Mira Brown, died, leaving as her only heirs, the appellees Mira Brown and Henry Brown; that the said Henry Bliss subsequently married, and died in 1873, leaving his wife, Martha Bliss, one of the defendants below, surviving him; that Martha Bliss, to whom said bond was executed, was the second wife of said Henry Bliss; that he left by his first wife, surviving him, his daughters Sarah, who intermarried with James M. Mason, Mary J., intermarried with George Train, Louisa, intermarried with Daniel Griswold, Maria, intermarried with Samuel H. Tam, and his sons, George R. Bliss and John Bliss, the latter of whom afterwards died, leaving William C. Bliss, Mary Bliss, intermarried with Riley Craig, Felix Bliss, George R. Bliss and Edgar Bliss, as his children and heirs, and Lucretia Bliss, his widow, surviving him, all of whom, together with Martha Bliss, the third wife of said Henry Bliss, are made defendants; that said Martha Bliss, to whom said bond was given, paid,

as the appellees are informed, the $500 to the said Hamilton and Taber; but offering, in case such payment had not been made, to pay the same, with the interest accrued thereon; that said James M. Mason is now in possession of said lot, and excludes the appellees therefrom; that he has, wrongfully and without right, possession of said title bond, and refuses to deliver it to the appellees, or to recognize their rights in said lot; that the appellees own 26-36 of said lot; that said Mason owns 1-36 part of said lot; that Lucretia Bliss owns 4-36 of said lot, and that each of the other defendants, heirs of said Henry Bliss by his first wife, own 1-36 part of said lot. The heirs of Cyrus Taber and Allen Hamilton are made parties, and it is alleged that they refuse to convey said lot to the parties equitably owning the same; that there is a hotel on said lot, and that said Mason is receiving the entire rents and income of the same.

The prayer is that the heirs of Taber and Hamilton be required to perform the said contract and make a title, according to the facts stated, to the plaintiffs for 26-36 parts thereof; that, if there is any unpaid purchase-money, the court should ascertain the same and direct how it should be paid; that Mason be compelled to deliver up the title bond; that a receiver be appointed to take possession of the lot and receive the rents of the same; that the title of the appellees be quieted, and for general relief.

The title bond is as follows: "Know ye, that we, Allen Hamilton and Cyrus Taber, of the counties of Allen and Cass, in the State of Indiana, are firmly held and bound unto Martha Bliss, of the county of Cass and State of Indiana, in the penal sum of $1,000, for the payment of which we hereby bind ourselves, our heirs and personal representatives, firmly by these presents, sealed with our seals and dated this 1st day of March, 1854.

"The condition of the above bond is such that, whereas the above bound Hamilton and Taber have this day sold unto the said Martha Bliss lot 20, as designated on the original

plat of the town of Taberville, in said county of Cass, and recorded in the recorder's office thereof, for the price and sum of $500, the receipt whereof is hereby acknowledged, upon the condition that said Martha Bliss pay all the taxes and assessments levied on said lot for the present and ensuing years: Now, therefore, should the said Hamilton and Taber, on or before the first day of March, 1856, execute to the said Martha Bliss a sufficient warranty deed in fee simple for said lot, then this bond should be void; else, in full force.

"ALLEN HAMILTON, [Seal.]
"CYRUS TABER, [Seal.]
"By STEPHEN TABER."

To this complaint, the heirs of Hamilton and Taber appeared and filed an answer in three paragraphs, the first being a general denial. The second alleged a want of consideration. The third states that the purchase-money for the lot in controversy had not been paid; that the $500, with interest thereon from the 1st day of March, 1854, is due; that, upon its payment, the legal holders of the bond would be entitled to a deed for the lot; that some of the heirs appellants are minors, but that, upon payment of the purchase-money, they are willing that the court should cause the lot to be conveyed to the legal holders of the bond.

Said heirs also filed a cross complaint against their co-defendants and the plaintiffs below, alleging that, prior to the 1st day of March, 1854, Allen Hamilton and Cyrus Taber, their ancestors, made a verbal contract for the sale of the lot in controversy, to said Henry Bliss, then in life, for the sum of $500, thereafter to be paid, under which parol contract he took possession of said lot; that on the 1st day of March, 1854, at the instance of said Henry Bliss, they made said title bond, a copy of which is filed with the cross complaint; that the same was made without any consideration moving from Martha Bliss to them, but solely in consideration of the promise of said Henry Bliss to pay for said lot; that, through the mistake of the scrivener, who drew said bond, the words, "the

receipt whereof is hereby acknowledged," were inserted therein; that said $500 were not paid, nor had any part of it ever been paid, but that the whole of said sum was then unpaid; that said mistake was not discovered until after the death of said Taber and Hamilton; that no part of said $500 was ever paid by said Henry Bliss or Martha Bliss to the said Hamilton and Taber, or to either of them, during their lifetime, nor has the same or any part thereof been paid to the legal representatives of said Hamilton and Taber, or to the legal representatives of either of them, nor to the cross complainants or any of them; that the said Martha Bliss, to whom said bond was made, died intestate, on the 22d day of February, 1871, and that the persons made parties to the cross complaint are her heirs; that the cross complainants had heard that said Martha Bliss, in her lifetime, sold and assigned said bond to their co-defendant, James M. Mason, and that he is the legal holder of the same; that there is due to the cross complainants the sum of $500 and interest thereon from the 1st day of March, 1854. The death of Allen Hamilton and Cyrus Taber, and the minority of some of the heirs are alleged.

The cross complaint prays that the bond may be reformed, by striking therefrom the words "the receipt whereof is hereby acknowledged;" that an account may be taken of the amount due them for said lot, and that, when paid, the lot should be conveyed, through a commissioner to be appointed by the court, to the parties entitled to the same, or that the court order a conveyance to be made to the proper parties, and that the cross complainants be declared to have a lien on said land for said purchase-money, and that the same be sold to pay said lien, and for all other proper relief.

James M. Mason, one of the defendants to the cross complaint of the heirs of Hamilton and Taber, answered the cross complaint in seven paragraphs: 1st. The general denial. 2d. That the purchase-money for said lot had been fully paid. 3d. That the claim is without consideration. 4th. That the cause of action alleged in said cross complaint did not accrue

within six years and eighteen months next before the commencement of this suit. 5th. That said cause of action did not accrue at any time within twenty years next before the institution of said suit. 6th. That the cause of action did not accrue within fifteen years and eighteen months next before the commencement of said suit.

The seventh paragraph of Mason's answer states, that he is the owner of said title bond described in said complaint, a copy of which is filed with the answer as a part of the same, and that he was such owner at the commencement of this suit, and is entitled to all the rights of said Martha and Henry Bliss therein; that the purchase-money had been received by said Taber and Hamilton; that Martha Bliss was, in 1854, put into possession of said lot, and that she and said Mason have been in the continuous possession of the same ever since, and have made valuable improvements thereon, costing over four hundred dollars; that, at the time said bond was assigned to him, Mason, he had no knowledge of any claim on said lot for unpaid purchase-money, but believed the purchase-money had been paid, and therefore purchased the same for a valuable consideration. He prays that the heirs of Hamilton and Taber be estopped to claim anything, but that if there shall be anything found due them, they be ordered to convey to him upon payment of such sum.

The heirs of Hamilton and Taber demurred separately to the third, fourth, fifth, sixth and seventh paragraphs of the answer of Mason to their cross complaint. The demurrers were overruled and the appellants excepted. The appellants then replied to the answer of Mason by a general denial. To the third paragraph of said answer, they also replied specially, that the claim set up in their cross complaint was for the purchase-money due on said lot mentioned in the original complaint, and that upon its payment they are ready to convey, etc. To the seventh paragraph of Mason's answer, they also replied specially, that at the time the bond was made, it was

agreed that upon the payment of $500 the said Hamilton and Taber should convey said lot, etc., but that through the mistake of the scrivener it was omitted and the bond written as the same is set forth in the complaint.

The plaintiffs below replied to the answer of the appellants in three paragraphs. They also answered their cross complaint in three paragraphs: First, the general denial. Second, payment. The third stated "that said alleged debt accrued more than twenty years before the commencement of this suit, and was barred by the statute of limitations."

The appellants demurred to the third paragraph of the plaintiffs' answer to their cross complaint. The court overruled the demurrer and they excepted.

The issues between the appellees and the appellants, both upon the original and the cross complaint, were, by agreement, submitted to a jury for trial, who returned a verdict for the appellees. The appellants moved for a new trial. The motion was overruled.

Afterward it was agreed by the parties that the issues between the plaintiffs below and the defendants, other than the appellants, should be tried by the court. The court, upon these issues, found that the plaintiffs owned two-thirds of said lots, and that the other third belonged to the other appellees. Judgment was rendered according to the findings.

The errors assigned involve the rulings of the court upon the demurrers to the answers of James M. Mason to the cross complaint of the appellants, upon the demurrer to the third paragraph of the answer of the plaintiffs below to said cross complaint, and upon the motion for a new trial.

The appellees do not insist with much earnestness upon the sufficiency of the fourth paragraph of the answer of James M. Mason to the cross complaint of the appellants. It is alleged that the cause of action set forth in the cross complaint did not accrue within six years and eighteen months next before the commencement of the suit. If the cross complaint is sufficient, this answer is clearly bad. But the ap-

pellees insist that the cross complaint is insufficient, and that the answer, though bad, is good enough for the complaint to which it is pleaded.

The cross complaint admits that the ancestors of the appellants made the bond sued on; that they owned, at the time, the lot described in the bond; their subsequent death, and that the appellants are their heirs. It avers that the recital in the bond as to the payment of the purchase-money is false; that the recital was inserted by mistake; that the whole of the purchase-money for said lot is unpaid, and still due, with interest thereon for several years. It further states that some of the appellants are minors; that the appellants are ready and willing to convey said lot to such of the appellees as may be entitled to the same, through a commissioner, to be appointed by the court, upon payment of the purchase-money.

The prayer of the cross complaint is, that the appellees be ordered to pay the purchase-money that may be found due, or that, in default thereof, the lot may be sold and the proceeds applied to the payment of said purchase-money, and for all other proper relief.

The original complaint alleged that the purchase-money had been paid. The suit was commenced to compel the appellants to transfer the title to the lot to the appellees. The bond, which was made a part of the original complaint, and also of the cross complaint, recites that the purchase-money for the lot had been paid. This the cross complaint contradicts. The real question between the parties is as to the payment of the purchase-money. The recital of its payment in the title bond did not estop the appellants to allege the contrary. Bigelow on Estoppel, p. 281, says: "It has been settled for many years that the acknowledgment in a deed of conveyance of the receipt of the consideration is not conclusive, but may be explained or disputed." This is not questioned, but the appellees insist that no action can be maintained by the appellants upon the bond for the purchase-money, until it is re-

formed by striking out the recital, which is alleged to have been inserted by mistake. We are referred, in support of this proposition, to the case of *Conger* v. *Parker*, 29 Ind. 380. We think the case not in point. By the terms of the deed in the case cited, the growing crops and fence rails passed to the grantee. The defendant claimed, that, by the original agreement, the crops and fence rails had been reserved to him, but that the reservation had been omitted from the deed by mistake. The court held that the defendant could not avail himself of the reservation without reforming the deed. It would hardly be pretended that in this case the appellants could not defeat the suit by proof of the non-payment of the purchase-money. But, aside from this, it can not be said that the cross complaint is founded upon the bond. The legal title to the lot is in the appellants. They hold the title as security for the payment of the purchase-money, which they allege to be unpaid. The recital in the bond simply operates as evidence of the payment of the purchase-money, but may be explained or contradicted. The object of the cross complaint is to compel the payment of the purchase-money, or foreclose the equity of the appellees in the lot.

In determining the sufficiency of the cross complaint, we must take the averment of the non-payment of the purchase-money as true. This being granted, we think it sufficient. It may be said that no deed has been tendered; but this, under the peculiar circumstances of this case, was not necessary. It is enough that appellants aver, as they do, a readiness and willingness, upon the settlement of the disputed question as to the payment of the purchase-money, to convey, through a commissioner, the title claimed by the appellees. They propose to transfer the title demanded by the appellees, and in the precise way in which they seek it. If the latter are unwilling to accept the title, appellants may, the purchase-money not being paid, foreclose their equity in the lot. *McCaslin* v. *The State, ex rel. Evans*, 44 Ind. 151; *Amory* v. *Reilly*, 9 Ind. 490. The court erred in overruling the demurrer of

the appellants to the fourth paragraph of the answer of James Mason to their cross complaint.

The court also erred in overruling the demurrer to the sixth paragraph of said Mason's answer to the appellants' cross complaint. This paragraph avers that the cause of action stated in the cross complaint did not accrue within fifteen years next before the commencement of the suit. The facts stated constituted no bar to the cross action.

We are also of opinion that the third paragraph of the answer of the plaintiffs below to the cross complaint is insufficient, and that the court erred in overruling the demurrer to it. Upon the facts stated in the cross complaint, the possession of the appellees was not adverse to the appellants. The former held in subordination to the title of the latter. The possession of the appellees gave them no title; they still held, at most, but an equitable interest in the land. The legal title was still in the appellants. The answer is, that the debt alleged did not accrue within twenty years. Does it follow upon the facts stated, that if the purchase-money had been due for twenty years, they must surrender their title to the delinquent debtor, without any relief? Might they not ask, upon the facts stated in the cross complaint, that the equity insisted upon by the appellees should be liable for the purchase-money? or, if the appellees refuse to pay, that the legal title retained by them as security for the debt, should be quieted as against such equity? We are inclined to the opinion that the appellants might insist upon such relief.

In the case of *Bennett* v. *Welch*, 25 Ind. 140, this court, in speaking of a counter-claim or cross complaint, in some respects not unlike this, says: "And there can be no doubt that the delay in the case before us was abundantly sufficient to have justified the appellee in regarding the purchase as having been abandoned. But by seeking to enforce it, he preserved its vigor for his own benefit, and it would not be creditable to our jurisprudence if he could be sustained in saying that he shall nevertheless be discharged from its per-

formance by his own mere volition. While seeking to compel a specific performance, and continuing thereby to admit an obligation to perform on his part, his acts were certainly inconsistent with an intention to object to doing so on account of the lapse of time, and this must be deemed a waiver of that objection."

Here the appellees are insisting upon a specific performance of the contract. They thereby admit their liability to perform on their part. They must be deemed to have waived all objection on account of the lapse of time. The demurrer to the third paragraph of the answer of the plaintiffs below to the cross complaint should have been sustained.

As, for these errors, the case must reversed, it is unnecessary to examine other questions in the record.

Per Curiam.—It is ordered that, upon the foregoing opinion, the judgment below be reversed, at the costs of the appellees.

No. 9236.

Nickless *v.* Pearson.

Attorney.—*Negligence.*—*Complaint.*—A complaint by a client against an attorney, averring that upon a note in his hands for collection, containing no waiver of appraisement laws, his attorney obtained a judgment with such waiver, in consequence of which the property of the debtor, worth $3,000, was sold for $306, leaving the debtor insolvent and $1,200 of the judgment unsatisfied and worthless, and that, if the judgment had been without the waiver, the property sold would have yielded enough to satisfy the judgment, is insufficient on demurrer.

From the Lawrence Circuit Court.

G. Putnam, W. R. Gardiner and *S. H. Taylor*, for appellant.

G. W. Friedley, E. D. Pearson, —— Martin and *S. D. Luckett*, for appellee.

FRANKLIN, C.—Appellant sued appellee as an attorney, for negligence in the collection of a note.

The complaint avers that on the 6th day of August, 1870, appellee owned a judgment against appellant, and to secure the payment of said judgment, appellant assigned to appellee as collateral security a note on one Roby; that appellee was to collect the same, satisfy the judgment out of the proceeds and pay the surplus, after deducting his attorney's fees, to appellant; that the amount of the note was in excess of the amount of the judgment. Appellee's receipt for the note as collateral security contained a stipulation that his judgment should bear ten per cent. interest. The note was dated August 3d, 1870, and due one day after date. That Roby at that time held and owned property out of which the amount of the note could have been made. That the note was executed without any waiver of valuation or appraisement laws. That at the August term, 1870, of the Daviess Circuit Court, said appellee took judgment on said note for $1,515.25, bearing ten per cent. interest, and procured the same to be rendered waiving relief from valuation or appraisement laws, and on the 20th of September, 1870, caused an execution to issue on the same, collectible without relief from valuation or appraisement laws, and caused the same to be levied upon one complete portable steam saw mill, with all the machinery and appurtenances thereunto belonging, which was of the value of $3,000, and other property of the value of $60, which was by the sheriff, on the 19th of December, 1870, sold to one James Wilson for the aggregate sum of $306, which was all the property owned by said Roby, at the time of said assignment or since, and who has since said sale remained insolvent. That the whole of the proceeds of said sale was consumed in the payment of the costs in the case. That if said judgment had been so rendered as to require said property to be appraised, it would have sold at two-thirds of its appraisement, and for more than enough to have paid the full amount of said judgment on said note; that said purchaser

would have bid and paid therefor the sum of $2,000. That said appellee holds both of said judgments in his own name. That by the negligent acts of appellee in having said judgment so rendered and said property sold without appraisement, he has lost the whole amount of said note. And he prays for satisfaction of appellee's judgment against him, and that he have judgment against appellee for the residue, in the sum of $3,000, in damages.

A demurrer was sustained to this complaint, and that presents the only question for consideration.

There can be no question as to an attorney's liability for damages resulting from a want of ordinary care and diligence in the management of his client's business. *Reilly* v. *Cavanaugh*, 29 Ind. 435; *Walpole's Adm'r* v. *Carlisle*, 32 Ind. 415; *Skillen* v. *Wallace*, 36 Ind. 319.

In the case at bar, want of timely diligence in the prosecution of proceedings to collect the note is not complained of, but the only complaint made is as to the manner in which the judgment was rendered, requiring execution thereof to be made without the benefit of appraisement laws.

The appraisement laws were passed for the benefit of the debtor and not the creditor. And we can not see how it could be considered as ordinary or gross negligence in an attorney, while representing the interest of the plaintiff, to take a judgment collectible without regard to the appraisement laws, when it should have been rendered subject to the appraisement laws.

The error was in favor of the plaintiff and not against him. And it was his own fault if he permitted the property to pass into the hands of a stranger without realizing more from the sale.

It would be a strange theory of the law to hold an attorney liable to his client in damages for every advantage that he might secure for his client, by mistake or otherwise, in the management of his business. We do not think that such a theory is sanctioned by precedent or practice.

We think the complaint does not state facts sufficient to

constitute a cause of action. There was no error in sustaining the demurrer to it.

The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be and the same is in all things affirmed, with costs.

No. 9272.

HACKLER ET AL. *v.* THE STATE, EX REL. COLEMAN ET AL.

SUPREME COURT.—*Evidence.*—*Practice.*—Where there is evidence in the record tending to support the finding of the court below, the Supreme Court will not weigh it to determine its sufficiency.

SAME.—*Justice of the Peace.*—*Breaches of Bond.*—*Omitted Allegation.*—In an action upon the bond of a justice of the peace, the complaint alleging as breaches his conversion of money collected on judgments and his failure to bring suit upon claims, evidence of his collection of money for the plaintiffs without process is not admissible.

From the Daviess Circuit Court.

J. W. Ogden and *C. L. Tharp*, for appellants.

J. M. Van Trees and *J. W. Burton*, for appellees.

BICKNELL, C. C.—This was a suit upon the official bond of a justice of the peace.

Two breaches were assigned:

1st. That the relators placed in the hands of the justice for collection, a large amount of notes, claims, accounts and demands, for a large portion of which said justice rendered judgments, collected the money thereon, and converted the same to his own use.

2d. That for a large amount of the notes, accounts, claims, and demands, so as aforesaid placed by the relators in the hands of said justice for collection, with instructions to issue

summons thereon, the persons owing the same were good, responsible and solvent, and resided within the jurisdiction of the justice, and so remained for five years, but have since become insolvent, and by the neglect and failure of said justice to issue summons, and render judgment and collect said notes, accounts, claims and demands, within a reasonable time, the same have been wholly lost to the relators, and that defendant, although often requested, has refused to pay over or account for said claims.

The defendant, the justice, answered in five paragraphs:

1st. The general denial.

2d. That the amount collected by suit and judgment was $539.23, of which only $360.07 was paid to defendant; that the remainder, to wit, $179.16, was paid by the parties to the relators; that $381.22 was collected by defendant without process, and paid to plaintiffs before the commencement of this suit; that by order of plaintiffs defendant gave up to Samuel Hyatt $149.47 of said notes and claims, and that the rest of said claims, to wit, $242.99, he has not been able to collect, and now offers to bring them into court and surrender them to plaintiffs; and that of this "last batch of claims, the plaintiffs themselves have collected $84.53, the remainder being insolvent or barred by the statute of limitations."

3d. Many of the claims were of doubtful solvency, and plaintiffs instructed defendant to use his discretion as to the manner of collecting the same, so as not to incur costs in litigating insolvent claims; that he brought suit on such claims as he deemed worth litigating, and collected on judgments, $360.07, which he paid over.

4th. That plaintiffs agreed to pay him ten per cent. for all he might collect without process, and he did so collect $381.22, for which plaintiffs now owe him $38.12, which is long past due and unpaid.

5th. A set-off of $21.75 for costs due and expenses paid.

The surety on the bond answered the complaint in two paragraphs:

1st. A general denial.

2d. Payment by the justice before suit brought.

The plaintiffs filed replies in denial of each of the foregoing special defences.

The issues were tried by the court without a jury; there was a finding for the plaintiffs for $350; the defendants' motion for a new trial was overruled, and judgment was rendered upon the finding.

The defendants appealed. The error assigned is that the court erred in overruling the motion for a new trial.

The reasons assigned for a new trial are:

1. That the damages are excessive.
2. The amount of the recovery was too large.
3. The finding is not sustained by sufficient evidence.
4. The finding is against the evidence.
5. The finding is against the law and the evidence.
6. The finding is contrary to law because of error of law occurring at the trial, and excepted to by defendant at the time, to wit, in allowing the plaintiffs to introduce evidence to show that defendant had collected money on the accounts and notes mentioned in exhibit B of plaintiffs' complaint, by other than legal process.

The appellants, in their brief, say that the reasons set forth in the first, second, third, fourth and fifth causes for a new trial, are substantially the same. The real question is, whether the finding is sustained by the evidence. We have examined the testimony; there is evidence tending to support the finding, and where that is the case, this court can not weigh the testimony. This rule is so well established, that no decision need be cited in its support.

As to the sixth reason, the first breach alleged was for converting to the use of the justice, and failing to pay over to the plaintiffs, money collected on judgments.

The second breach alleged was for failing to bring suit upon claims which might have been collected by suit.

Neither of these breaches relates to or charges that any money

was collected by the justice without process, and it was, therefore, error to admit, over the defendants' objection, evidence of money collected without process. There was no breach alleged under which such evidence was admissible.

For this error, the judgment must be reversed.

PER CURIAM.—It is therefore ordered by the court, upon the foregoing opinion, that the judgment of the court below be and it is hereby reversed, at the costs of the appellees.

No. 8556.

FAY v. BURDITT.

CONTRACT.—*Unsoundness of Mind.*—The contract of an insane person, whose disability has not been judicially determined, is voidable only, and not void.

SAME.—*Disaffirmance.—When Contract of Insane Person will not be Set Aside.*—An insane person, unless his insanity had been judicially declared before the contract was made, has not the same unqualified right, as an infant or married woman, to disaffirm his contract; and when there is nothing in his appearance, conversation or conduct to indicate his mental incapacity, and he makes a contract with one without notice of his condition, which is in itself fair and just, and such contract becomes so far executed that the parties can not be placed *in statu quo*, the contract will not be set aside.

SAME.—*Chattel Mortgage.—Title to Property.—Possession.—Demand.—Replevin.*—A chattel mortgage executed by an insane person, whose mental unsoundness has not been judicially determined, will vest the title, and, after default in the condition, the right of possession of the chattel in the mortgagee; and actual possession obtained under it can not be made wrongful without a disaffirmance. In such case, there must be, therefore, a disaffirmance before an action can be maintained to recover the chattel from the mortgagee.

SAME.—*Semble*, that a party to a contract should not be allowed to disaffirm on account of insanity, without restoring what he had received, or offering to make compensation therefor, if the other party acted in good faith, and the contract itself was fair.

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SAME.—*Instructions.—Burden of Proof.—Shifting of Burden.*—In an action by the mortgagor of a chattel, to recover possession on the ground of his insanity when he made the mortgage, it was not error to instruct "That the plaintiff must have established, by a preponderance of evidence, that he was insane at the time he executed the note and mortgage," nor in refusing to instruct "That if the plaintiff had established by a preponderance of the evidence, that he was of unsound mind prior to the making of the chattel mortgage, then the burden of proof is cast upon the defendant to show that the plaintiff was of sound mind at the time," etc. The burden of proving insanity is on the one who alleges it.

Quære, whether it is quite accurate to say that the burden of a particular affirmative issue ever shifts in the course of the trial from one party to the other.

From the Benton Circuit Court.

M. H. Walker, *D. Smith* and *I. H. Phares*, for appellant.

R. C. Gregory and *W. B. Gregory*, for appellee.

WOODS, J.—Complaint in two paragraphs for the wrongful taking and detention of personal property.

The first paragraph is in the common form and need not be further noticed. The principal questions in the case arise upon the alleged error of the circuit court in overruling the appellant's demurrer for want of facts to the second paragraph of answer to the second paragraph of the complaint.

There is a third paragraph which alleges an unlawful conversion of the property, but no question arises under it.

The following are the substantial averments of the second paragraph, to wit: That the plaintiff is the owner and lawfully entitled to the following described personal property (description), which has not been taken by virtue of any writ, etc.; but the same has been wrongfully taken and is unlawfully detained by the defendant under color of a pretended sham and void chattel mortgage, executed by this plaintiff to the defendant, on the 7th day of January, 1878, to secure the payment of a promissory note of the same date, for one hundred and twenty dollars, payable one year after date; that the plaintiff, when he made the note and mortgage, was of unsound mind and wholly incapable of understanding, and

did not understand the nature, purport, contents and meaning of said instruments; that he has now so far recovered the use of his mental faculties as to be able to comprehend the ordinary affairs of life, and to make contracts and to maintain and prosecute this suit in his own behalf; that the defendant well knew that the plaintiff was "utterly insane" at the time he made said note and mortgage to her, but, for the fraudulent purpose of obtaining his signature to said papers, she combined and conspired with one Lamb, and they by fraud and false representations procured the plaintiff to sign and deliver the note and mortgage, which fraud and false representations were, that the note and mortgage were without consideration, and that the defendant threatened to take and drive away said property and appropriate it to her own use, unless the plaintiff complied with her request, and have him sent to the insane asylum; and but for these things, and his mental unsoundness and incapacity to understand the ordinary affairs of life, he would not have signed the note and mortgage; that they were given without any consideration whatever, and by reason of the premises are invalid. Wherefore he prays that he may recover said property, or if the defendant has disposed of it, then its value.

The answer in question is to the effect, that if the plaintiff was of unsound mind when he made the note and mortgage, the defendant was ignorant of the fact; that at that time the plaintiff appeared to be rational and competent to transact ordinary business; that the defendant had known him for five years or more, and during all that time his soundness of mind was not questioned to the defendant's knowledge until a short time prior to his bringing this suit, and then suspicion of such unsoundness of mind arose only from the publication of the matter by the plaintiff himself; that said note and mortgage were executed for a balance due the defendant from the plaintiff of unpaid rent for sixty-five acres of good farming lands, with buildings, in Benton county, which the defendant had leased to the plaintiff for a term extending from

March 1st, 1877, to February 28th, 1878, for 650 bushels of corn or the value thereof in money, payable January 1st, 1878; that the defendant accordingly took and held possession of the farm for the entire term aforesaid, and, in a settlement subsequently made between them, the plaintiff, having chosen to pay the rent in money, made said note for the balance due the defendant; that the plaintiff is a farmer and had always pursued that business for the support of himself and family, and the use and occupation of farm land was to him a necessity; that in all of the defendant's transactions with him, she acted in good faith, and, the plaintiff having had the full enjoyment of the lease for the time aforesaid, the parties can not now be placed *in statu quo*. Wherefore, etc.

This answer shows that the note and mortgage were made upon a sufficient valuable consideration; and, aside from the alleged unsoundness of the plaintiff's mind, the charge of fraud, as stated in the complaint, is in terms too general to be of significance. The question upon the demurrer, therefore, comes to this: The plaintiff was of unsound mind, but the fact was not apparent or known to the defendant, who leased him her farm for one year. He took and enjoyed the possession, made a settlement and executed his note to the defendant for the balance of the rent, and to secure its payment executed a chattel mortgage upon the property, which he now seeks to recover. The possession of the defendant was obtained and held solely under color or by virtue of the mortgage, and was rightful, unless the alleged unsoundness of the plaintiff's mind made it wrongful. It is not averred that before bringing the action the plaintiff had made a demand for the property, or had done any other act to notify the defendant that he had elected to disaffirm his note or mortgage.

If the pleader had been content to abide by the general averments of ownership and right of possession in the plaintiff, and the unlawful taking and detention by the defendant, the paragraph would have been good, and the question one

of proof, but as he chose to aver the facts specially, the question of the legal effect of the facts stated is presented.

Upon these facts, it seems clear, upon authority as well as reason, that the plaintiff was not entitled to recover. It is now the well settled doctrine of this court, that the contracts of the unsound in mind, whose incapacity has not been judicially determined, are not void, but only voidable, and may, upon the removal of the disability, or by the act of a lawfully appointed guardian, be disaffirmed or ratified. *Musselman* v. *Cravens*, 47 Ind. 1, and cases cited; *Nichol* v. *Thomas*, 53 Ind. 42; *Freed* v. *Brown*, 55 Ind. 310; *Wray* v. *Chandler*, 64 Ind. 146; *Hardenbrook* v. *Sherwood*, 72 Ind. 403; *Schuff* v. *Ransom*, 79 Ind. 458.

If the contract in respect to the party of unsound mind is wholly executory, no act of disaffirmance is necessary, and the incapacity may, of course, be pleaded in defence to the action by the other party, or his assignee.

But if the contract has been performed, or if the consideration has been paid, or the possession of property parted with, under the contract, by the party under disability, there must be an act of disaffirmance before the other party can be put in the wrong, and a complete right of action established to recover the consideration so paid, or the possession of property which had been surrendered or taken away under the contract or deed. Cases, *supra*.

The execution of a chattel mortgage vests the title to the chattel at once in the mortgagee, not absolutely, indeed, but on a condition subsequent; and unless it is otherwise stipulated, the right of possession follows the right of property. If there be such a stipulation, the right of possession follows the right of property upon a breach of the condition. Jones Chattel Mortgages, section 426.

The plaintiff does not allege that he had been adjudged to be *non compos*. This being so, his mortgage was not void, and, until disaffirmed, it justified the taking and holding of possession of the property by the appellee. It follows that,

if otherwise good, the second paragraph of the complaint is bad, because it does not allege a disaffirmance before bringing the action.

But the question arises, and may as well be considered here as upon the instructions, which also present it, whether, upon the facts stated in the answer, the plaintiff, though of unsound mind when he made the note and mortgage, had the unqualified right to disaffirm and set them aside.

Counsel for the appellant insist, that once the insanity of a party to a contract, of whatever character, is conceded, the right to disaffirm is absolute; while counsel for the appellee contend, as the court below instructed, that "The contracts of persons of unsound mind, who are not under guardianship, are, at most, only voidable. Courts will enforce or disregard such contracts, according to the circumstances of the case. If there is nothing in the appearance, conversation or actions of the person of unsound mind, indicating his mental incapacity, and if a person, ignorant of his unsoundness of mind, makes a contract with him, taking no undue advantage, and if such contract becomes so far executed that the parties can not be placed in the same condition respecting the subject-matter of the contract that they were in immediately before the making of such contract, the law permits the contract to stand, and will not disturb it on account of the mental incapacity of one of the parties."

This is in accord both with authority and with reason and conscience. In *Musselman* v. *Cravens*, *supra*, a passage from Story is quoted with approval, which concludes as follows: "And so, if a purchase is made in good faith, without any knowledge of the incapacity, and no advantage had been taken of the party, courts of equity will not interfere to set aside the contract, if injustice will thereby be done to the other side, and the parties can not be placed *in statu quo*, or in the state in which they were before the purchase." 1 Story Eq. Jur., sections 227, 228.

And so, in 1 Chitty Contracts (11th ed.) 191, it is said:

"In like manner, it has been decided, that where a person apparently of sound mind, and not known to be otherwise, enters into a contract for the purchase of property, which is fair and *bona fide*, and which is executed and completed, and the subject-matter of the contract has been paid for and fully enjoyed, and can not be restored so as to put the parties *in statu quo;* such contract can not be set aside, either by the alleged lunatic, or by those who represent him. And so, where the plaintiff had entered into a contract for the purchase of land, and had paid a deposit on the purchase-money, pursuant to the conditions of sale; and it appeared that, at the time of the contract, he was a lunatic, and incapable of understanding its meaning; but that the defendant entered into the contract and received the money fairly and in good faith, and without knowledge of the lunacy: it was held, that the plaintiff could not recover back the money."

In *Wilder* v. *Weakley's Estate*, 34 Ind. 181, it was said: "It has long been established that a lunatic, like an infant, is liable for necessaries suitable to his condition in life. But the more modern authorities go much further." And, after quoting from Addison Con. (6th ed.) 1033–4, an extract to the same effect as the foregoing, the following is added:

"We think it may be safely stated, both on principle and authority, that where a person apparently of sound mind, and not known to be otherwise, and who has not been found to be otherwise by proper proceedings for that purpose, fairly and *bona fide* purchases property and receives and uses the same, whereby the contract of purchase becomes so far executed that the parties can not be placed *in statu quo*, such contract can not afterwards be set aside, or payment for the goods be refused, either by the alleged lunatic or his representatives." See authorities collected by Rawle in Smith on Con. (5th ed.) 343–4; *LaRue* v. *Gilkyson*, 4 Pa. St. 375; *Beals* v. *See*, 10 Pa. St. 56; *Molton* v. *Camroux*, 2 Exch. 487; S. C., Ewell Lead. Cases, 614; *Beavan* v. *McDonnell*, 9 Exch. 309; S. C., 10 Exch. 184; *Loomis* v. *Spencer*, 2 Paige, 153; *Campbell* v.

Hooper, 3 Smale & G. 153; *Fitzhugh* v. *Wilcox*, 12 Barb. 235; *Person* v. *Warren*, 14 Barb. 488; *Yauger* v. *Skinner*, 14 N. J. Eq. 389; *Young* v. *Stevens*, 48 N. H. 133; *McCormick* v. *Littler*, 85 Ill. 62; *Hassard* v. *Smith*, 60 Ired. Eq. 429; *Behrens* v. *McKenzie*, 23 Iowa, 333; *Sims* v. *McLure*, 8 Rich. Eq. 286; *Matthiessen, etc., Co.* v. *McMahon*, 38 N. J. L. 536; *Lincoln* v. *Buckmaster*, 32 Vt. 658; *Long* v. *Long*, 9 Md. 348; *Lancaster Co. Nat'l Bank* v. *Moore*, 78 Pa. St. 407.

It is manifest that a person of unsound mind, whose incapacity has not been judicially determined, can not, with a due regard for the rights of others, be permitted, like an infant (except as to necessaries) or a married woman, to exercise the privilege of disaffirming his contracts, irrespective of their character and the circumstances under which they were made. Every person may well be on his guard as to whether he is dealing with a married woman, or an infant; but not so as to the insane who afford no outward sign of their incapacity. The presumption of law is, that any person of mature years is of sound mind, and in the absence of something in his appearance or conduct to indicate, or of some other notice of the incapacity, the person who contracts with him fairly must be protected, else there can be no safety in dealing, one man with another. *Eberwine* v. *The State, ex rel. Koster*, 79 Ind. 266.

The issue was made in the case before us, and, by the instructions of the court, was fairly submitted to the jury, whether the defendant dealt with the plaintiff in good faith, believing him to be of sound mind; whether the lease and the note and mortgage were fair and just contracts toward the plaintiff; and upon these points the finding of the jury was for the appellee. There was no dispute that the appellant had occupied and had the use of the farm during the term of the lease. He had had, therefore, the full benefit of the contract on his part, a benefit which he could not restore to the appellee, and for which, therefore, in good conscience, and in order to place her *in statu quo*, he ought to have made, or offered to make, a just compensation. He had in the first instance given

a mortgage to secure the discharge of his obligations under the lease, but instead of paying in full the rent in corn or money, as stipulated, he gave a note for the amount unpaid, and a new mortgage, which, therefore, was not merely a security for a pre-existing debt. It was a substitute for the prior security as well, and under it, after default in its condition, the defendant had taken, sold and bid in the mortgaged property. And now, without offering to make payment to the defendant of a just compensation for the use of her farm, the appellant disaffirms the mortgage, and asks the court to aid him in recovering the property. There is neither law nor equity in the proposition.

It would seem, on principle, that if the defendant had dealt with plaintiff, knowing his incapacity, he would have had the unqualified right to disaffirm his note and mortgage, and to reclaim his chattels, leaving her to such remedy, if any, as the law could afford her, to recover compensation for the use of her land. If the lease of the farm was a necessity to the plaintiff, he ought, it would seem, to be liable, in any event, for the fair value, if not for the agreed price. It has been held to be sufficient notice, where the circumstances known in regard to the other's mental condition were such as to convince a reasonable and prudent man of his insanity, or even to put him on inquiry, by which he might, if reasonably prudent, have learned the fact. *Lincoln* v. *Buckmaster*, 32 Vt. 658. See note to *Wirebach's Ex'r* v. *First Nat. Bank*, 21 Am. Law Reg. 29.

There is apparent conflict in the cases upon the question whether the insane party to a contract or deed, on restoration to his right mind, or his guardian for him, may recover what he parted with, without restoring what he received in the transaction. See *McGuire* v. *Callahan*, 19 Ind. 128; *Nichol* v. *Thomas*, *supra*; *Arnold* v. *Richmond Iron Works*, 1 Gray, 434; *Gibson* v. *Soper*, 6 Gray, 279; *Foss* v. *Hildreth*, 10 Allen, 76; *Henry* v. *Fine*, 23 Ark. 417.

If determined upon principle, it would seem that if the other party to the contract entered into it in good faith and with-

out notice of the incapacity, and the contract itself was fair, either an actual restoration would be necessary, or, if that had become impossible, a just compensation instead; and if neither restoration nor fair compensation could be accomplished, then, under the rule already stated, a disaffirmance would not be permitted.

If the other party to the transaction had notice of the disability, or the contract was unfair or fraudulent on his part, the party who had been under disability, except in case of a contract for necessaries, should be allowed to disaffirm upon restoring or offering to restore what he had received, or so much of it as remained in his possession or control after the disability was removed, and after he had become fully informed in reference to the contract and his rights and obligations under it; but further than this, he should not in such case be required to restore or make compensation for what he had received. If what he had received had been converted into something else, yet in his possession, he ought perhaps to surrender that to the other party.

These subjects, however, must be regarded as open for further consideration, as the questions may arise. They are not directly involved here.

It is insisted that the court erred in instructing "that the plaintiff must have established by a preponderance of evidence that he was insane at the time he executed the note and mortgage." "We have complained of this instruction," says counsel, "because there is evidence in the record tending to show that he was insane prior to the execution of the note and mortgage, and the presumption of law is that the same condition of mind continues."

There was no error in the instruction. The presumption spoken of does not affect the burden of the issue. The plaintiff was bound to prove his insanity at the time of making the contract. This he might do by proving a prior insanity of a character which was likely to continue, and the instruction says nothing to the contrary.

The appellant asked the court to instruct that "If the plaintiff has established by a preponderance of the evidence that he was of unsound mind prior to the making of the chattel mortgage, then the burden of proof is cast upon the defendant to show that the plaintiff was of sound mind at the time of the execution of said mortgage," etc.

The court properly refused so to instruct. It depends much on the character of the insanity proven, how strong the presumption of its continuance ought to be, and it is a question of fact, in view of the circumstances of the case, whether the disability, once shown to have existed, did in truth continue to the time in question. The burden of proving insanity at a time stated can not shift from the party who has alleged it. The proof of prior insanity may be, and unless controverted will be enough; but when all the evidence *pro* and *con* has been heard, including the prior insanity, which is only an item of evidence on the point, the decision must be against him who alleged the insanity, unless the preponderance of all the evidence was with him.

It may be doubtful whether it is quite accurate to say that the burden of a particular affirmative issue ever shifts in the course of a trial. The necessity for offering further evidence in respect to it may change from one side to the other, but this is quite a different thing from a change of the burden of the issue itself.

Where the issue is formed by the averment of facts on one side, and a denial thereof on the other, and the evidence is confined to the inquiry, whether the facts averred were true, it is plain that the technical burden of proof remains throughout with the party who affirms; but where, under the issue so formed, it is competent for the defendant, besides disputing the plaintiff's case, to admit it, and prove other facts in avoidance, as, for instance, in cases before or which originated before justices of the peace, and in actions for the recovery of possession of property, real or personal, there may be clearly a shifting of the burden of proof.

Thus, in *Meikel* v. *The State Savings Institution, etc.*, 36 Ind. 355, 359, it was said: "This making out a *prima facie* case by the evidence, and thus casting the burden of meeting it on the other side, occurs in every day practice." And in *Hayes* v. *Fitch*, 47 Ind. 21, is quoted Sharswood's note to 1 Starkie's Ev. 587, which reads as follows: "If the defendant would show matter in avoidance, after a *prima facie* case has been made out by the plaintiff, the burden of proof shifts upon him."

The significance and correctness of this statement depend on the meaning to be attributed to the phrases "matter in avoidance" and "*prima facie* case." So long as the dispute is concerning the *prima facie* case—the facts which constitute it—the burden is on the plaintiff, but when that case is conceded, and matter in avoidance is sought to be shown, the burden shifts. But this, it is plain, is a shifting of the issue, as well as of the burden of proof. The first issue was the truth of the plaintiff's alleged case; the new issue is the truth of the proposed matter in avoidance.

As a general proposition, the burden of proof in respect to the different parts of a case may be determined by reference to the pleadings, the plaintiff being bound to prove, if denied, what he has affirmed in his complaint or reply, and the defendant what he has affirmed in his answer; but, beyond the reply, with which, under the code, pleading stops, the question must be determined by the nature of the evidence and its relation to the case, the burden of rebutting being on the defendant, of surrebutting on the plaintiff; and in actions of replevin, ejectment, or the like, wherein the pleadings do or may end with the complaint and an answer in denial, the burden of the evidence is upon the party who, if special pleading were required, would be bound to allege the particular matter sought to be proven. In some cases, as in *Hayes* v. *Fitch*, *supra*, and *Uhl* v. *Bingaman*, 78 Ind. 365, it may be necessary as a rule of pleading, for a party to negative his consent to an act, or notice of a fact, and yet he may not be

required to produce evidence on the point, it being sufficient for him to establish the affirmative matters of his plea, to avoid which the other party must prove the fact which the first had denied. In such case there is a shifting of the burden of proof; but it is not an exception from the proposition that the burden of proof does not change unless upon a corresponding change of the issue or affirmative matter in dispute. The second party does not deny the *prima facie* case, or, stated more accurately, the *pro hac vice* conceded case, of the first party; but, in avoidance of it, advances new matter, which he has the burden of proving, just as if he had pleaded it specially.

The questions considered have been presented and argued in a variety of ways, but the points decided dispose of the merits of the case.

Judgment affirmed, with costs.

Opinion filed at November term, 1881.

Petition for a rehearing overruled at May term, 1882.

No. 9183.

Stevens v. Works et al.

Fraudulent Conveyance.—*Subsequent Creditor.*—*Costs.*—*Execution.*—Where one, already embarrassed beyond his ability to pay, in anticipation of a possible indebtedness for costs of a lawsuit which he afterwards commences, and for the purpose of evading payment thereof, conveys real estate to another, upon a secret arrangement that the latter shall pretend to own it, that it may escape execution, but hold it for the use of the grantor, and that his other assets shall be disposed of before the liability for costs shall accrue, it may be made subject to execution to satisfy a subsequent judgment for such costs, if other property can not then be found liable to execution.

From the Switzerland Circuit Court.

W. D. Ward and *T. Livings*, for appellant.

J. D. Works and *J. A. Works*, for appellees.

MORRIS, C.—The appellant commenced this suit against the appellees to set aside a conveyance of certain real estate on the ground of fraud.

The complaint consists of two paragraphs, to which demurrers were sustained. The appellant elected to stand by his complaint and final judgment was rendered for the appellees.

The rulings upon the demurrers are assigned as errors.

It will only be necessary to notice the second paragraph of complaint, for, if that shall be held to be sufficient, the judgment below must be reversed; if held insufficient, the first must also be held to be insufficient, as it is less full and complete than the second, and in that case the judgment must be affirmed.

The second paragraph of the complaint states that on the —— day of July, 1877, the appellee Thomas Works was the owner of certain real estate situate in the county of Switzerland and State of Indiana, which is particularly described; that said Thomas Works was also the owner of some land in Ohio county, Indiana, which was heavily incumbered by mortgage; that he had other real and personal property of the value of $1,500, in all of the value of $3,000; that he was indebted to divers persons in the sum of $5,000, and was then contemplating insolvency; that he then intended to, and soon thereafter, to wit, on the 3d day of September, 1877, did, bring a suit against the appellant for slander, in the Switzerland Circuit Court; that on the first named day or soon after bringing said action for slander, and while so indebted, it was fraudulently agreed by and between him and the appellee Addison Works, that the former should convey to the latter said land in Switzerland county; that the conveyance should be placed upon record, while, by a verbal agreement and understanding between them, the said Thomas was to remain the owner of said land and retain the possession of it as fully as if said conveyance had not been made; that they both should publicly announce and give out that

said Addison had bought said land, and that he should exercise pretended acts of ownership over the same, to prevent the appellant from taking it in execution to satisfy any judgment that he might recover against said Thomas in said action of slander; that said Thomas Works, pursuant to said fraudulent agreement, then made a voluntary conveyance of said land, situate in Switzerland county, to the said Addison Works without any consideration whatever, for the fraudulent purpose of hindering, delaying and cheating his creditors, and especially the appellant, as to the collection of any sum that might be adjudged against said Thomas Works in favor of the appellant in said action for slander; that said Thomas was at the time of contemplating, contriving and intending to make said conveyance and bring said action, largely in debt to various parties in the sum of five thousand dollars; that he intended, contrived and planned with his pretended grantee, Addison Works, who aided him in said fraud, to make said conveyance for the purpose aforesaid, with the intention, understanding and agreement that the said Thomas should afterwards sell and dispose of the residue of his property to innocent purchasers in such way as that it could not be reached by the appellant and his other creditors, and so that he could use the proceeds in living and paying off his other indebtedness so far as might be necessary, and to sell and dispose of it to others in such way as he could and as might suit his convenience and place it beyond the reach of execution, and so that he might become insolvent by the time the appellant could recover any judgment in said slander suit; that said Thomas and Addison Works are both attorneys at law and familiar with the decisions of this court and knew that it would take some time to reach a decision in said slander suit; that they undertook and agreed to evade the law in making said voluntary conveyance before said Thomas had disposed of his said other property; that the appellee Charlotte Works is the wife of the said Thomas Works, and the appellee Mary is the wife of Addison Works; that all

of said appellees agreed that said Thomas should retain possession of said land so fraudulently conveyed, and that the same should be his property as fully as if said conveyance had not been made.

It is then averred that on the 8th day of November, 1878, the appellant recovered a judgment for costs in said slander suit against the said Thomas Works, for $200; that execution had been issued on said judgment, and returned no property of the said Thomas found whereon to levy the same; that before and soon after the recovery of said judgment, the said Thomas Works, in accordance with his original scheme and purpose, had so disposed of all his property, other than that fraudulently conveyed to the appellee Addison Works, as to place it beyond the reach of execution, and that he was, at the time of the rendition of said judgment, wholly insolvent, having no property left out of which the appellant's judgment, or any part of it, could be made.

The prayer is that the said conveyance from said Thomas to said Addison Works may be declared fraudulent as against the appellant, and that said land may be declared subject to the payment of the appellant's judgment, and for other proper relief.

Do the facts stated show that the conveyance in question was executed with intent to defraud the appellant? The conveyance is alleged to have been made without consideration. It is also alleged that the grantor was at the time indebted in the sum of $5,000, and that his property, real and personal, other than that in controversy, did not exceed $3,000 in value. It is further averred that, at the time the conveyance was made, the grantor was intending to commence a suit against the appellant for slander, and that said conveyance was made with the view of so covering up the property conveyed that it could not be reached on execution to satisfy any judgment which the appellant might obtain in the action to be commenced against him for slander; that it was a part of the scheme deliberately agreed upon and planned by the principal defendants below,

that the grantor, Thomas Works, should, before the final disposition of the slander suit, dispose of all his other property liable to execution, for the purpose of securing a living, paying other debts and preventing it from being taken to satisfy any judgment the appellant might recover in said action for slander; that it was verbally agreed between the grantor and grantee that the former should remain in possession of the land conveyed, and own it as fully as if said deed had not been made.

The demurrer admits these allegations to be true; but it is contended by the appellees that from all these facts it can not be legally inferred or held that the conveyance was fraudulent as against the appellant's claim. It is not alleged that the appellee Thomas Works purposely commenced an unfounded suit against the appellant, with a view to involve him unjustly in costs, nor is it averred directly that he expected at the time that the appellant would obtain a judgment against him for costs, but it is stated that the grantor contemplated the possibility, if not the probability, of such a recovery, and that the conveyance was made, and his other property disposed of, to prevent the collection of such possible judgment. Upon the facts stated, the conveyance in question and the disposition of the residue of the property of Thomas Works must be regarded as one transaction, to which both he and Addison Works were parties. Thus regarding the transaction, it was completed and consummated nearly a year before the appellant's claim accrued. In the case of *Inhabitants of Pelham* v. *Aldrich*, 8 Gray, 515, it was held that the debt for costs adjudged to the defendant in an action accrues at the time the judgment is rendered, and not before. *Ogden* v. *Prentice*, 33 Barb. 160. The appellant, must, therefore, be regarded as a subsequent creditor, and the question is, whether as such he can recover upon the facts stated.

It is averred in the complaint that the conveyance was made to defraud the creditors of Thomas Works generally, and especially the appellant. It is also alleged that his then in-

debtedness was $5,000, and that his property, aside from that alleged to have been fraudulently conveyed, did not exceed $3,000 in value. It is not shown that the creditors, other than the appellant, have been defrauded in fact.

Subsequent creditors are within the 17th section of the act for the prevention of frauds and perjuries, 1 R. S. 1876, p. 506. *Miller* v. *Wilson*, 15 Ohio, 108; *Lyman* v. *Cessford*, 15 Iowa, 229; *Dart* v. *Stewart*, 17 Ind. 221.

Bump, in his work on Fraudulent Conveyances, 2d ed., p. 308, says: "It is accordingly well settled, that if a party makes a conveyance of his property with the express intent to become indebted to another, and to defraud him of his debt by means of this artifice, such subsequent creditor may contest and by proof defeat the transfer, although he was not a creditor of the grantor at the time of the conveyance."

Ordinarily, to establish fraud in such cases, as to subsequent creditors, it must appear that the grantor held himself out as the owner of the property, or that he occupied the same apparently as such owner, and that the credit was given upon the supposed ownership of it. This rule rests largely upon the fact that in such cases the credit is voluntarily given, and may rest upon the personal integrity of the debtor, without particular reference to his means. But, in the case before us, the credit was not voluntarily incurred, it was coerced and compelled by the act of the appellee himself; the appellant unwillingly, and in spite of himself, was, by the act of the grantor, forced to become his creditor. The averments of the complaint show, that, for the purpose of avoiding this coerced credit, Thomas Works disposed of all his property. The indebtedness of Thomas Works, at the time he made the deed, the continued possession of the property by him, as well as the alleged agreement between him and his grantee that the residue of the grantor's property should be disposed of before the termination of the slander suit, abundantly justify the conclusion that the transaction was fraudulent as against the appellant. *Pell* v. *Tredwell*, 5 Wend. 661; *Farmers*

Bank, etc., v. *Long*, 7 Bush, Ky. 337; *Ayer* v. *Bartlett*, 6 Pick. 71; *Merrill* v. *Rinker*, 1 Bald. 528.

There is upon the facts stated no question as to the insolvency of Thomas Works. It is averred that, before the judgment was obtained, all his property had been disposed of for the fraudulent purpose of preventing its collection. Nor is the question as to whether Thomas Works had, at the time the deed was made to Addison Works, other property sufficient to pay his then existing debts, material, for if, as alleged, it was all disposed of to defeat the claim of the appellant, pursuant to the alleged agreement between Thomas and Addison Works, by which the land in dispute was conveyed to the latter, and held by him in secret trust for the judgment debtor, it should, in common justice and honesty, be held liable for the appellant's judgment.

We think the court erred in sustaining the demurrer to the complaint.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be reversed, at the costs of the appellees.

No. 9218.

RAY, RECEIVER, v. MCGINNIS, GUARDIAN, ET AL.

81 451
126 205
81 451
126 78
81 451
148 221

GUARDIAN AND WARD.—*Parties.*—In a suit upon a claim due from the defendant as guardian, the ward is neither a necessary nor a proper party.

SAME.—*Claim against Ward's Estate for Money Borrowed by Guardian to Remove Liens on Real Estate.*—Money loaned to a guardian who is authorized by the court to borrow the same for the purpose of removing liens from the land of his ward, and who uses it for such purpose, constitutes a claim against such ward's estate, and the person who loans it may recover it from such estate.

From the Marion Circuit Court.

W. Wallace and *L. Wallace*, for appellant.
H. Dailey and *W. N. Pickerill*, for appellees.

BEST, C.—The appellant, as receiver of the Indianapolis Savings Bank, brought this action against the appellees. In the second paragraph of the complaint, it was substantially averred that George F. McGinnis had been duly appointed the guardian of Lillie Galloway, and, on the 28th day of November, 1876, as such guardian, he made his report to the circuit court of said county, showing that his ward's estate was indebted in the sum of $939.62, and that $369.63 of such sum was due for taxes, tax sales and street improvements, which were liens upon real estate owned by his ward; that at the same time he filed his petition, showing that his ward had no means with which to pay said claims; that it was for the best interest of his ward's estate to borrow sufficient money with which to pay said claims, and to secure its payment by executing a mortgage upon lot one (1), in square eleven (11), in Indianapolis, Marion county, Indiana, then and now owned by said ward; that the court, being of opinion that it would benefit the estate of said ward to borrow the money, authorized and directed said McGinnis, as guardian, to borrow $400, for a period not exceeding five years, at not more than ten per cent. interest, and to secure its repayment by executing a mortgage upon said lot; that said McGinnis, after procuring said order, applied to the Savings Bank, a corporation existing by virtue of the laws of Indiana, for a loan of said sum, which sum said bank loaned him, and took from him a note for the same, payable one year from date, with interest at ten per cent. and five per cent. attorney's fees, and also a mortgage on lot one, copies of which are filed with the complaint, which note and mortgage were made by said guardian to secure said loan, and the money so obtained was applied by said guardian in payment of said claims, all of which greatly benefited the estate of said ward; that said note is due and unpaid, and that said guardian refuses to pay the

same; that, since the execution of said note, said bank has gone into liquidation, and this plaintiff has been duly appointed receiver, etc.; that said note and mortgage have duly come into his hands as a part of the assets of said bank. Prayer that the claim may be allowed against the estate of said ward and the guardian be directed to pay it out of the personal estate; that, if that can not be done, the guardian be ordered to file his petition for the sale of some of the real estate of the ward to pay the claim.

A demurrer by McGinnis as guardian, and by him personally, for the want of facts, was sustained to the complaint. A like demurrer by Lillie Galloway was also sustained, and final judgment rendered for the appellees.

These rulings present the only questions in the record.

The demurrer by Lillie Galloway was properly sustained, as she was neither a proper nor a necessary party. *Vogel* v. *Vogler*, 78 Ind. 353.

No personal judgment is sought against McGinnis, and for this reason the ruling upon his demurrer becomes immaterial.

The ruling upon the demurrer by McGinnis, as guardian, is the only question argued.

The appellee McGinnis insists that a guardian has no power to mortgage the real estate of his ward, and this is conceded by appellant. It is further insisted, that as the note is in the usual form, signed "Geo. F. McGinnis, guardian of Lillie Galloway," it does not bind the ward's estate, and in support of this position, the cases of *Hays* v. *Crutcher*, 54 Ind. 260, *Hayes* v. *Matthews*, 63 Ind. 412, and *Hayes* v. *Brubaker*, 65 Ind. 27, are relied upon. These cases seem to support the position taken.

The appellant, however, insists that notwithstanding the fact that the court may have had no authority to authorize the guardian to mortgage the real estate of his ward, yet the money furnished by the appellant, under the circumstances stated in the complaint, constitutes a claim against such ward's estate. Our statute does not expressly authorize a guardian, with or

without an order of court, to borrow money for the benefit of his ward's estate, and if such power is possessed, it is implied in order to enable him to discharge the duties imposed upon him by the statute.

Section 9 of "An act touching the relation of guardian and ward" is as follows: "It shall be the duty of every guardian of any minor: * * * * *Second.* To manage the estate for the best interest of his ward. * * *Fifth.* To pay all just debts due from such ward, out of the estate in his hands," etc.

Unless this statute confers the authority, it is not possessed. This statute imposes the duty upon the guardian to manage the estate for the best interest of his ward, and to pay all just debts of his ward out of her estate in his hands. The manner of discharging this duty depends largely, if not wholly, upon the condition of the estate. If it consists of money, the debts, if any, may be easily paid, and the estate managed without difficulty; if it consists of realty, it may or it may not be necessary to sell it in order to pay the debts. Whether it should be sold, depends upon circumstances. If it consists of productive real estate, the rents of which will, within a reasonable time, enable the guardian to extinguish the debts, a sale of the property at its full value to pay the debts might not be advisable; if it consists of unproductive real estate, that probably could not be sold without a great sacrifice, and the encumbrance can be carried at a reasonable rate of interest until such time as an advantageous sale can be made, or the encumbrance otherwise removed, it would seem that the duty imposed by the statute would authorize, if not require, the guardian to thus manage the estate. Otherwise, the very rules of law, adopted for the protection of such estates, would operate to destroy them, as the person appointed to manage them is powerless to do so, at the very time when management is most needed. Suppose the encumbrance had been a mortgage, drawing the highest rate of interest allowed by law, and the guardian, under the order of the court, had carried it by paying the interest from time to time, would it be contended

that such payments do not constitute proper charges against the ward's estate? If the guardian, instead of carrying the supposed encumbrance, had paid it under the order of the court, in order to protect the interests of his ward, would he not be allowed the amount so paid, with interest, as a charge against the ward's estate? We have no doubt of it, and we think that the appellant, having furnished the money at the instance of the guardian, under the order of the court, and the same having been applied in payment of the claims against the ward's estate, is entitled to recover the same from such estate.

For these reasons, we think the court erred in sustaining the demurrer of the guardian, and for this error the judgment should be reversed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment be and it is hereby in all things reversed as to the guardian, McGinnis, at his costs, and affirmed as to Lillie Galloway, with instructions to overrule the demurrer of said guardian to second paragraph of the complaint.

No. 9217.

ENGLISH, EX'R, *v.* THE STATE, EX REL. FIELDS.

SUPREME COURT.—*Practice.—Waiver.—New Trial.*—Reasons for a new trial covered by a specification in an assignment of error, but not discussed, will be regarded by the Supreme Court as waived.

SAME.—*Evidence.—Competency.*—The competency of evidence can not be objected to for the first time in the Supreme Court.

SAME.—*Preponderance.*—The Supreme Court will not weigh evidence tending to support a verdict, to determine its preponderance.

GUARDIAN AND WARD.—*Removal from State.—Damages.*—In an action by a ward, in 1880, upon the bond of his guardian who had, in 1873, removed from the State without accounting and paying over, the measure of damages upon recovery was provided by section 163, 2 R. S. 1876, p. 551.

From the Marion Circuit Court.

J. R. Wilson and *J. L. Wilson*, for appellant.
W. W. Herod and *F. Winter*, for appellee.

BICKNELL, C. C.—This was a claim against the estate of Elisha G. English, deceased.

Thomas Tull, in 1864, was appointed guardian of the minor heirs of George W. Fields, deceased; he gave bond in $1,000, with Elisha G. English as surety.

There were seven of said minor heirs, of whom Elbridge Fields was the youngest. The guardian, after making one report to the proper court, in which he charged himself with $112.81, as due to said Elbridge Fields, on the 27th of March, 1866, and after receiving $1,348.41 from the treasury department of the United States, as pension money due said minor heirs, and to be divided amongst them until they reached the age of sixteen years respectively, removed from the State of Indiana, and has never paid said Elbridge Fields any part of his share of said moneys.

Elbridge Fields became sixteen years old on the 6th day of November, 1873. In June, 1880, he filed this claim upon his guardian's bond, against the appellant as executor of the surety.

When a guardian has removed from the State, suit may be brought upon his bond. Acts 1867, p. 130, section 2.

And in such a case the measure of damages upon recovery is the value of the property converted, or the amount of money unlawfully retained, with interest, such exemplary damages as the court or jury trying the case may be willing to give, and ten per centum on the whole amount assessed. 2 R. S. 1876, p. 592, section 13, and p. 551, section 163.

The claim was duly verified; it stated the following breaches of the bond:

1st. That the said Thomas Tull, guardian as aforesaid, has converted the entire interest of plaintiff in said trust fund to his own use and benefit.

2d. That the said Thomas Tull refuses to pay to said Elbridge Fields the amount due him, although said Fields is of full age, to wit, the age of twenty-one years, and has repeatedly demanded such payment and settlement.

3d. That in 1873 the said Tull removed from the State of Indiana and is now a resident of the State of Kansas, and has not filed with any court, having proper jurisdiction thereof, any report of the receipts and disbursements of said trust funds, and has given no proper account thereof, since March 27th, 1866, although such reports have long since been due.

Copies of the bond, the oath of the guardian and the letters of guardianship were annexed to the claim and filed therewith, and there was a bill of particulars stating the amounts received by said guardian, with the dates of such receipts, and also stating the amount claimed for interest.

There was no demurrer to the claim; the defendant answered in two paragraphs:

1st. The general denial.

2d. Payment.

The plaintiff replied denying the second paragraph of the answer. The issues were tried by the court who found for the plaintiff $1,000. The defendant moved for a new trial and filed the following reasons therefor:

1st. The decision of the court is contrary to law.

2d. The decision of the court is contrary to the evidence.

3d. The decision of the court is not sustained by sufficient evidence.

4th. The damages assessed by the court against the said estate are excessive.

5th. The court erred in the assessment of the amount of recovery against said estate, the same being too large.

The motion for a new trial was overruled. Judgment was rendered for $1,000 and costs, and the defendant appealed. He assigns errors as follows:

1. The complaint of the plaintiff does not state facts sufficient to constitute a cause of action.

2. The court erred in overruling appellant's motion for a new trial.

The first of these errors is not discussed in the appellant's brief, and is therefore regarded as waived.

Of the five reasons alleged for a new trial, the third only is discussed by the appellant in his brief, viz.: that the decision of the court is not sustained by sufficient evidence. The other reasons are, therefore, regarded as waived. *Mackenzie* v. *The Board, etc.*, 72 Ind. 189.

The evidence is shown by a bill of exceptions. It consists of oral testimony and of documentary evidence. None of it was objected to at the trial. Its competency, therefore, can not be objected to in this court. *Holderbaugh* v. *Turpin*, 75 Ind. 84.

The evidence tended to support the finding. No evidence at all was offered on behalf of the appellant; when there is evidence tending to support the finding, this court will not weigh the evidence for the purpose of determining whether the preponderance would not be against the finding. *Lentz* v. *Martin*, 75 Ind. 228; *Phœnix, etc., Ins. Co.* v. *Hinesley*, 75 Ind. 1; *Hayden* v. *Cretcher*, 75 Ind. 108. The evidence tends to show that the note for $360, which the appellant claims was not due when the guardian, in his first report, charged himself therewith, had been collected before it was due, but the evidence also shows that, throwing out the claimant's share of that note, his judgment, including interest and ten per cent., would be for more than $1,000.

The appellant claims that one-seventh of the amount of pension money received could not amount to $1,000; but here were seven minor heirs entitled to share in the money when the guardian was appointed, in 1864; the youngest of them, the appellee's relator, was born November 6th, 1857; he was sixteen years old November 6th, 1873; his share had been increasing, as the older children became sixteen years old and were left out. The evidence tends to show that William and Alexander, the two oldest children, were sixteen years old as

early as March, 1867, one of them probably earlier, and that the next two, who were twins, reached that age in March, 1868; that the fifth child was aged sixteen in March, 1870, and the sixth in November, 1871. So that the appellee's relator was entitled to all of the last payment, and to half of the payment next before the last, and to one-third of the next preceding payment, and so on to the beginning, when his share was one-seventh.

The evidence tends to show that the relator's shares of the several payments of pension money, and interest on each, and ten per centum on the entire amount, would exceed the amount of the judgment below, without including the relator's share of the aforesaid note for $360.

There was no error in overruling the motion for a new trial. The judgment of the court below ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment of the court below be and it is hereby in all things affirmed, at the costs of the appellant.

No. 8880.

McFADDEN ET AL. v. HOPKINS ET AL.

CHATTEL MORTGAGE.—*Indemnifying Mortgages.—Priority.*—Of two indemnifying mortgages that first executed and recorded is the prior lien.

SAME.—*Conversion.*—The holder of a senior mortgage may maintain an action against the holder of a junior mortgage for a conversion of the mortgaged goods.

SAME.—*Damages.*—The purchaser of mortgaged property takes it subject to the mortgage, and, if he convert it, he is liable to the mortgagee for its value not exceeding the amount due on the mortgage.

SAME.—*Fraud.—Evidence.—Supreme Court.*—Where, in such a case, the evidence shows actual notice of the mortgage, and that the mortgagor was permitted to remain in possession of the goods and sell them at retail, but no actual fraud, the Supreme Court will not interfere with a verdict for the mortgagee.

From the Daviess Circuit Court.

J. T. Pierce, for appellants.
J. W. Burton, for appellees.

FRANKLIN, C.—The following are the facts out of which this suit grew: On the 3d day of January, 1876, appellee Hopkins stayed a judgment in the Daviess Circuit Court, rendered against appellee Hart and one Thomas, for $1,484, and took from Hart, as security, an indemnifying mortgage upon a stock of dry goods and other personal property, which mortgage was duly recorded. And on the 12th day of November, 1879, he paid off the balance of the judgment, being over $1,200.

On the 18th day of February, 1876, appellants endorsed for said Hart a note to the First National Bank of Franklin, Indiana, for $1,000, and at the same time took an indemnifying mortgage from said Hart upon the same stock of goods and a part of the other personal property, subject to Hopkins' mortgage, which mortgage was also duly recorded. Appellants paid off the note at maturity in June following.

The stay on the judgment expired June 22d, 1876. On the 20th of September, 1876, appellants purchased of appellee Hart $500 worth of the goods, at invoice price, for which they agreed to give a credit on the amount they had paid on the bank note.

Hart had retained the possession, use, management, control and sale of the mortgaged property from the date of the Hopkins mortgage to the day of the sale to appellants, and in the mean time had sold of the goods to the amount of $4,600, and had replaced with new stock to the amount of $2,151.18, and had appropriated some of the goods to the use of his family.

On the 13th of December, 1879, appellee Hopkins commenced this suit against appellants for a conversion of the goods. He sets forth in his complaint his mortgage and the the payment of the judgment; he alleges the insolvency of both Hart and Thomas at the date of the expiration of the

stay of the judgment and ever since, and then avers that appellants "wrongfully and unlawfully took, hauled and carried away all of said stock of general merchandise described in said mortgage, and removed the same from said county of Daviess without the knowledge or consent of the plaintiff, and wrongfully sold and disposed of said personal goods, and appropriated and converted the same and the proceeds thereof to their own use, and by reason of the wrongful and unlawful acts of the defendants as aforesaid, the plaintiff says he has sustained damages in the sum of one thousand dollars," etc.

A demurrer was overruled to the complaint, and answers and replies filed. There was a trial by jury; verdict for appellee Hopkins, and over a motion for a new trial judgment was rendered for $425.25.

Hart did not join in the appeal, and he is, therefore, joined as appellee in this court.

The errors assigned are, overruling the demurrer to the complaint, and overruling the motion for a new trial.

The reasons assigned for a new trial are, that the verdict is not sustained by sufficient evidence, and is contrary to law.

As to the first error assigned, the complaint does not state all the facts of the case; it does not show that appellants were creditors of Hart, and that they had taken goods, under a contract with Hart, in payment of so much of their debt against him, but charges appellants with being tortfeasors, without any claim of right. As against a wrong-doer, appellee's mortgage would authorize him to maintain the suit. We think the complaint, upon its face, states facts sufficient to constitute a cause of action, and there was no error in overruling the demurrer to the complaint.

As to whether the evidence supported the verdict, and as to whether it was according to law, depend upon the validity of appellee's mortgage as against appellants.

There is no conflict in, or dispute about, the testimony; we have substantially stated the facts as testified to.

Appellee had the right to take possession of the property,

or foreclose his mortgage and sell the equity of redemption, at any time after the expiration of the stay of the judgment and Hart failed to pay according to the covenants in his mortgage, without waiting until he had paid off the judgment himself. *Gunel* v. *Cue*, 72 Ind. 34; *Durham* v. *Craig*, 79 Ind. 117. Where there are two indemnifying mortgages, that which is first executed and recorded has the prior lien. The lien begins with its execution and delivery, and not with the payment of the debt indemnified against. *Krutsinger* v. *Brown*, 72 Ind. 466. The mortgagor has a right to sell the equity of redemption in the mortgaged property, but the purchaser takes the property subject to the mortgage, and if he disposes of it, and converts the proceeds to his own use, he is liable to the mortgagee for its value, not exceeding the amount due on the mortgage. *Duke* v. *Strickland*, 43 Ind. 494; *Coles* v. *Clark*, 3 Cushing, 399. Therefore, if appellee's mortgage is valid as against appellants, the evidence supported the verdict of the jury; but if it is invalid as against creditors, appellants being such, the verdict is not supported by the evidence, and is contrary to law. As to whether it was valid or invalid against appellants, depends upon whether it was fraudulent. The 21st section of the Statute of Frauds, 1 R. S. 1876, p. 506, reads as follows: "The question of fraudulent intent, in all cases arising under the provisions of this act, shall be deemed a question of fact," etc. Under this statute, this court has held that a recorded mortgage, upon its face, can not be declared fraudulent and void as against creditors; that fraud, in such a case, is a question of fact, to be submitted to the court or jury upon the trial. *McLaughlin* v. *Ward*, 77 Ind. 383; *Lockwood* v. *Harding*, 79 Ind. 129; *Morris* v. *Stern*, 80 Ind. 227.

In the first case above named, this court said: "Under this statute, any recorded mortgage, which is valid between the parties to it, will be upheld against third parties, unless, for some reason, it is actually fraudulent as against them; and whether fraudulent must be deemed a question of fact, to be determined according to the circumstances of the particular case."

Appellee's mortgage being regularly recorded, the evidence upon the trial showed that it was executed in good faith, and for a valid consideration, and although the mortgagor was permitted to remain in possession of the goods, and sell them by retail, there was no actual fraud in fact proven to exist in the transaction. Appellants' mortgage contained a clause that the goods were subject to appellee's mortgage; hence they took the goods and disposed of them, with both actual and constructive notice of appellee's claim on them. The whole question of fraud was submitted, upon the evidence, to the jury, and they having found in favor of appellee, we see nothing in the evidence upon which the verdict can be interfered with.

The verdict is sustained by the evidence, and is not contrary to law.

There was no error in overruling the motion for a new trial.

The judgment below ought to be affirmed.

Per Curiam.—It is therefore ordered, upon the foregoing opinion, that the judgment below be and it is hereby in all things affirmed, with costs.

No. 9358.

Robertson, Administrator, et al. v. Garshwiler, Guardian.

Practice.—*Joint Motion for New Trial.*—A joint motion for a new trial must be good for all who join in it, else it is not available for any of them, and where the finding and judgment are for one defendant and against another, a joint motion for a new trial will not avail either of them.

Same.—*Admission in Complaint.—Evidence.—Payment.*—Under a plea of payment to an action on a promissory note, it is competent for the plaintiff to show that a credit admitted in the complaint is for the same payment evidenced by a receipt produced by the defendant.

Set-Off.—*Guardian.*—An individual obligation of a guardian can not be set off against a cause of action held by him as guardian.

From the Marion Circuit Court.

F. M. Finch and *J. A. Finch*, for appellants.

J. V. Hadley, E. G. Hogate and *R. B. Blake*, for appellee.

WOODS, J.—The appellee, as guardian, brought this action upon a promissory note made by Amos and Emily Birchard, payable to the order of the appellee at a bank in this State, and endorsed by the appellant Piel. The makers of the note having both died, the appellant Robertson was appointed administrator of the estate of said Emily, and in that capacity was made defendant.

The appellants severed in their defences, Robertson pleading a set-off and the coverture of his intestate, and Piel answering by a general denial and a plea of suretyship. The court found in favor of the defendant Robertson, upon the answer of coverture, and gave judgment in his favor, but found against Piel in favor of the appellee in the sum of $640, and entered judgment accordingly.

The first error assigned and discussed by counsel is the sustaining of the demurrer to the set-off pleaded by Robertson. The ruling, however, was clearly right. The alleged set-off consisted of an individual obligation of the plaintiff Garshwiler, which was not lawfully capable of being set off against a cause of action which he held as guardian. "The principle of mutuality, in such cases, requires that the debts should not only be due to and from the same person, but in the same capacity." *Dayhuff* v. *Dayhuff's Adm'r*, 27 Ind. 158.

The other questions in the case arise under the overruling of the motion for a new trial, the discussion on behalf of the appellant being directed to the admissibility of certain testimony and to the amount of the recovery. At this point, the appellee insists that no question is presented, because the motion for a new trial was a joint motion by both defendants, and that, Robertson not being entitled to a new trial, as he clearly was not, the motion was not available for the appellant Piel.

Such seems to be the rule of practice. It was so decided in the case of *First National Bank, etc.*, v. *Colter*, 61 Ind. 153, in

which there was a joint verdict against the parties who joined in the motion; and where, as in this case, the finding is for one and against the other, the reason for applying the rule is manifestly stronger.

The principal objection to the testimony, however, is that the plaintiff was allowed to offer evidence in explanation of a credit admitted in the complaint. It is insisted that it was not competent for the plaintiff to dispute the credit so admitted; and, if true in fact, the objection would be well taken. The effect of the evidence, however, was not to dispute the complaint, but simply to show the source of the credit, and that it was identical with and constituted a part of a sum for which the plaintiff had given a receipt, which was put in evidence by the defendant.

This disposes, too, of the claim that the amount of the recovery was too great.

Judgment affirmed, with costs.

No. 8850.

Fry et al. v. State, ex rel. Wilson.

Bastardy.—*Recognizance.*—*Breach.*—*Failure to Replevy.*—*Judgment.*—In bastardy the defendant entered into the usual recognizance to appear and abide the judgment. The cause was afterwards compromised by agreement between the putative father and the mother, by the payment of a sum of money, and a stipulation for a judgment for a certain sum, payable as the court should direct, to be replevied. Judgment was accordingly entered, the relatrix acknowledging in court that satisfactory provision had been made for the support of the child.

Held, that a failure to replevy the judgment was not a breach of the condition of the recognizance.

From the Howard Circuit Court.

N. R. Linsday and *T. A. De Land*, for appellants.

R. Vaile and *J. F. Vaile*, for appellee.

MORRIS, C.—The complaint states, that at the December term, 1878, of the Howard Circuit Court, the appellants entered into a recognizance for the appearance of Samuel M. Fry at the next term of said court, to answer the State of Indiana, on the relation of Ellen Wilson, upon a charge of bastardy, then pending in said court. The bond is as follows:

"Know all men by these presents, that we, Samuel M. Fry and Luke Fry, are held and firmly bound unto the State of Indiana in the penal sum of five hundred dollars. The condition of the above obligation is such, that whereas an action is now pending in the Howard Circuit Court, wherein the State of Indiana, upon the relation of Ellen Wilson, is plaintiff, and said Samuel M. Fry is defendant, the same being an action for bastardy: Now, if the said Samuel M. Fry shall be and appear at the Howard Circuit Court, on the first day of the next term thereof, there to remain and not to depart without leave and to abide the order and judgment of the court, then this obligation shall be void, otherwise to remain in full force and effect.

"Witness our hands and seals, this 15th day of January, 1879.

"SAMUEL M. FRY, [Seal.]
"LUKE FRY. [Seal.]

"Approved this 15th day of January, 1879.

"C. N. POLLARD, Judge."

It is alleged in the complaint that both Samuel M. Fry and the relatrix appeared at the March term, 1879, of said court, and compromised said proceedings in bastardy; that the said Samuel M. agreed to pay said relatrix $100 in cash, and suffer judgment to go against him for the sum of two hundred and twenty-five dollars, payable as the court may direct, to be replevied by such surety as the court may accept, each party to pay the costs made by each; that, in pursuance of said agreement, the said court rendered judgment against the said Samuel M. for $225, for the use of said relatrix, and ordered said defendant to replevy said judgment, and that, upon doing so, he should pay of said sum, $100 in twelve months

and $125 in twenty-four months from the date of said judgment. A copy of the judgment and order of the court is filed with and made part of the complaint, and so treated by the parties. It is as follows:

"Come the parties by counsel, and this cause is now compromised and settled as per the following agreement, to wit:

"State, *ex rel.* Wilson, *v.* Samuel Fry.

"The parties hereto have this day compromised the above cause, upon the following terms, to wit: The defendant is to pay the relatrix in cash $100, and suffer a judgment to go against him for the sum of $225, payable as the court may direct, to be replevied by such surety as the court may accept, and each party, relatrix and defendant, to pay all costs made by each respectively.

"In witness whereof the parties have hereunto set their hands and seals, this 28th day of March, 1879.

"Ellen Wilson.

"Samuel Fry.

"And said relatrix now appears and acknowledges in open court that satisfaction has been made to her for the support and maintenance of her illegitimate child by said defendant.

"And the court now renders judgment against defendant for said sum of $225, as per said agreement. It is therefore considered by the court, that the plaintiff, relatrix herein, recover of defendant said sum of $225, and that the defendant pay all costs and charges by him made in this cause, which sum shall be paid in instalments, in case said judgment be replevied, as follows: $100 in twelve months, and $125 in twenty-four months from date.

"It is therefore considered by the court that the relatrix pay all costs by her made in the prosecution of her complaint herein; and that the defendant replevy said judgment by good freehold surety."

The failure of Samuel M. Fry, the principal obligor, to replevy the judgment for $225, as directed by the court, constitutes the breach of the bond complained of.

The appellants demurred to the complaint. Afterwards, the counsel for the defendants below withdrew by leave of the court, their appearance for Samuel M. Fry, and then Luke Fry filed his separate demurrer to the complaint. The demurrer was overruled, and he answered the complaint in five paragraphs. A separate demurrer was filed to each paragraph of the answer, and sustained by the court. Proper exceptions were taken to the rulings of the court upon the demurrers. The appellant Luke Fry refusing to answer further, final judgment was rendered for the relatrix.

The errors assigned involve the rulings of the court upon the demurrer to the complaint and the demurrers to the answer.

It appears from the complaint that the proceedings in bastardy were compromised and settled by the relatrix and the alleged father of her child. In accordance with the conditions of the bond sued on, Samuel M. Fry appeared at the March term of the Howard Circuit Court. The relatrix also appeared in open court and entered of record in due form her admission that satisfactory provision had been made for the support of her bastard child. The contract of compromise and support was entered upon the records of the court. It provided that a judgment for $225 should be rendered against the father of the child, payable as the court might direct, to be replevied by such security as the court should accept, each party to pay his or her costs; $100 additional was to be paid in cash.

Upon and in pursuance of this agreement and compromise, as the cause of action, the court rendered judgment in accordance with its terms. Samuel M. Fry failed to put in bail as provided by this contract and directed by the judgment of the court.

We think it quite clear that the judgment was no part of the bastardy proceedings proper; it was authorized by and founded upon the agreement of the parties; it provided for new and independent security; it was the consummation of an agreement

made by Samuel M. Fry, to be secured as provided by its terms, and not otherwise. Had no security been provided for, none could have been demanded. Upon the agreement and the judgment rendered upon it, the appellee had a right to require Samuel M. Fry to secure it as agreed, but she had no right to insist that Luke Fry was bound by the agreement or the judgment which followed it. It was not competent for Samuel M. Fry, by the disregard or violation of the agreement entered into between him and the relatrix for the support of their illegitimate child or otherwise, to create a breach of the bond sued on as against Luke Fry.

The entry of the admission by the relatrix upon the record, that provision to her satisfaction had been made for the support of her child, ended the bastardy suit. It might as well be insisted, had Samuel M. Fry promised to marry the relatrix as a part of the inducement to enter satisfaction of record, that his refusal to do so would constitute a breach of the bond sued on, as that his failure to replevy the judgment in question constitutes such breach. *Noble* v. *The State, ex rel. Hines*, 39 Ind. 352 and 355.

We think the court below erred in overruling the demurrer to the complaint.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be reversed, at the costs of the relatrix, with instructions to sustain the demurrer to the complaint.

No. 8753.

COREY *v.* COREY.

DIVORCE.—*Alimony.*—*Attorney's Fees.*—*Antenuptial Contract.*—Where at marriage the wife is 33 and the husband 77 years of age, and there was an antenuptial contract concerning property, containing a release of all share in the husband's estate upon his death, and it appeared that the

husband had made provision for the wife beyond the requirements of the contract, an allowance to the wife of $25 for attorney's fees, and a refusal to allow alimony, will not be disturbed by the Supreme Court.

From the Madison Circuit Court.

W. R. Pierse and *C. B. Gerard*, for appellant.

E. P. Schlater and *C. L. Henry*, for appellee.

FRANKLIN, C.—The court below decreed a divorce to appellant on a charge of cruel treatment by appellee. The day after the divorce was decreed appellant filed a motion to require appellee to pay her necessary expenses, in the sum of two hundred dollars, in the prosecution of the divorce suit; the motion or petition was verified by appellant, and the affidavits of her two attorneys were filed in connection therewith, stating that she had agreed to pay them two hundred dollars as attorney fees, for prosecuting the divorce case. Upon which the court allowed her $25, and made an order that appellee pay the same.

Appellant excepted, for the reason that the court did not allow enough.

On the third day after the divorce was decreed, appellant filed a motion asking the court to allow and adjudge to her alimony in the sum of $2,000, which motion was overruled by the court. The appellant then filed a motion for a new trial as to the alimony, which was also overruled and exceptions reserved.

The following errors have been assigned in this court:

1st. Overruling motion for a new trial.

2d. Overruling motion for alimony.

3d. In only allowing $25 for expenses.

At the time of the trial, April, 1880, appellant was thirty-six years old, and appellee eighty. They were married January, 1876, and separated December, 1879. At the time of the marriage, appellee had considerable property; appellant had none. There were no children by this marriage, but appellee had a family of children by a former marriage.

Before this marriage the parties entered into an antenuptial contract, dated January 1st, 1876, and which reads as follows: "Whereas we have heretofore entered into a contract to be united together in the holy bonds of matrimony as husband and wife, which contract is hereafter to be completed and solemnized: We now, before the final consummation and solemnization of said marriage contract, have entered into the following antenuptial contract and agreement, to wit: The said Abner Corey agrees and binds himself that as long as they shall both live after their marriage as intended, he will ever provide for and treat the said Catharine H. Ross, as a good and faithful husband should do, and that if he shall die first, then, at his death, said Catherine H. shall take as her portion of his goods the following real estate in Madison county and State of Indiana:" (then follows a lengthy description of a lot in Anderson); "also she shall have as her own, without appraisement, all the household and kitchen goods and furniture owned by said Corey at the death of said Corey; also there shall be paid to her of any property, seven hundred dollars ($700) in money at my death or in six months thereafter, to be her own forever. And in consideration of the above and foregoing, the above named Catharine H. Ross agrees and binds herself that after their marriage as agreed and anticipated, that she will dwell with, care for, and cherish and love and respect the said Abner Corey as a faithful and dutiful wife should, so long as they shall both live. And if the said Abner Corey die first, she hereby agrees and binds herself, that she will receive and accept the above described house and lot during her lifetime, and the household and kitchen goods and furniture, and the seven hundred dollars ($700) in money, as above named, in full of all her interest, right, title and claim in and to all the property, both real and personal of said Corey at the time of his death, and that the same shall be in full of all her rights and claims to and in the property of said Corey, as his widow, and that at his death she will release and turn over to the other heirs,

children and legal representatives of said Corey, all of his property, real and personal, of every kind, except the property above enumerated and described as her own share and part of his, said Corey's, property."

Before the separation, appellee had deeded to appellant the house and lot described in Anderson, worth some $1,200; the house was afterwards burned, and left the lot worth some $400. He had given her $100, with which she had bought another lot, upon which he built her a house, at a cost of $535; he had bought for her an organ, at a cost of $200; he had given her a note, secured by a mortgage, for $125; he had given her another note, not secured, for $45; had surrendered, cancelled and destroyed a note on her father for $25, at her request. At another time, had given her $100 in money; when they separated he gave to her $40 in money and the household furniture. He afterwards had given to her $25 at one time and $10 at another time.

Thus she had received all the property provided for in the the antenuptial contract but the $700, but in the place of which she had received some $1,500 in money and other property. She had, however, surrendered to him a note for $300, which he had executed to her before marriage in compromise of a suit for a breach of marriage contract, which she had brought against him.

That no additional property was accumulated during the marriage relation between them, and that his property was worth some $10,000, which remained undistributed as advancements to his children.

Considering the great disparity between the ages of the parties, appellant could not very flatteringly hope for many years of social enjoyment with appellee, and that it required some other considerations than love and affection to create much congeniality between the parties. Too often such considerations bring about unfortunate matches. Since this appeal, the appellee has departed this life, and the name of his executor, Edward R. Carman, has been substituted.

In actions of divorce, the question of alimony must necessarily be left largely to the discretion of the court below, and unless there has been a clear abuse of the exercise of that discretion, this court will not interfere. *Powell* v. *Powell*, 53 Ind. 513; *Conn* v. *Conn*, 57 Ind. 323.

Upon an examination of the facts and circumstances in this case, as developed by the evidence, we do not see any sufficient equitable reason for coming to the conclusion that the court below had abused its discretionary powers in relation to the alimony that should be allowed appellant. She not only got as much, but more than she contracted for in the marriage, and the rule of the law established in this State by precedents, that when the property has been accumulated by the joint efforts, care and diligence of both the parties, the wife ought to have about the same share that she would be entitled to at the death of her husband, all things being considered, does not apply in this case. The question of the accumulation of the property is out of the case.

There was no error in the court's overruling the motion for alimony, or the overruling of the motion for a new trial, as to the claim for alimony.

As to the motion to require appellee to pay appellant's expenses in the prosecution of the divorce suit, that was also addressed to the sound discretion of the court. No agreement that she could make with her attorneys could have any binding force as to how much should be allowed. While the sum seems small, we can not overlook the fact that the court had cognizance of all the facts and circumstances of the case, and we can not say that the court erred in the amount allowed. The judgment below should not be reversed for this reason. We see no error in this record. The judgment below should be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be and the same is in all things affirmed, with costs.

Opinion filed at the November term, 1881.

Petition for a rehearing overruled at the May term, 1882.

No. 9163.

Andrews et al. v. Swanton et al.

Parties.—*Husband and Wife.—Notice.*—In a suit to foreclose a mortgage upon lands purchased by a married woman subsequent to the mortgage, her husband is a proper party defendant, and it is not necessary to aver that he had notice of the mortgage.

Pleading.—When a party is made defendant to answer to his interest, he can not, after verdict, object to the complaint that his interest is not specifically stated.

Practice.—Objection to the sufficiency of a reply comes too late after verdict.

Same.—*New Trial.*—Where a party negligently and without excuse fails to prepare for trial, he can not get a new trial because of surprise, and of accident preventing his presence at the trial; and if upon such a motion there be counter affidavits contradictory of the statements of those in support, the Supreme Court will not interfere with the ruling on the motion.

From the Cass Circuit Court.

D. P. Baldwin and *D. D. Dykeman*, for appellants.

M. Winfield and *Q. A. Myers*, for appellees.

Elliott, J.—The appellees brought this suit upon a mortgage executed to them by John Kirkham and wife. The mortgage was not recorded, and Lucy Andrews subsequently purchased the mortgaged real estate, but, as the complaint avers, with actual knowledge of the mortgage. It is alleged that Thomas Andrews is the husband of Lucy, and, as such, is made a party to the action. No question as to the sufficiency of the complaint was made in the court below, but its sufficiency is here challenged by the assignment of errors. It is contended that it does not state a cause of action against Thomas Andrews. We think it does show that he was a proper party to the foreclosure suit, for it shows that his wife was the owner of the equity of redemption, and that, as her husband, he had an inchoate interest in the property. It was proper, if not necessary, to make him a party to the suit in order that all right of redemption might be barred.

It was not necessary to allege that Thomas Andrews had

notice of the mortgage. He possesses only such rights as his marital relations confer upon him, and notice to his wife was all that need be shown. Whatever infirmities there are in her title necessarily exist in his rights or interests. He can not have a better title or higher right than that possessed by his wife, from whom his whole interest flows.

Where a party is brought into court to answer as to his interest in land, it is not necessary that the complaint should specifically set forth the character of his title or interest. The nature of his title is a matter peculiarly within his own knowledge, and, in such cases, the plaintiff is not held to any great degree of particularity in pleading title in his adversary.

If the appellant Thomas Andrews had a title superior to that of appellee's mortgage, he should have asserted it when brought into court and challenged to make his true interest appear. He can not, for the first time, successfully assail the complaint, because it does not fully set forth his interest, by an assignment of errors. We do not think he could do so by demurrer, but we are certain that, after verdict, such an objection can not prevail.

The complaint not only alleges that Lucy Andrews had notice of the mortgage, but it also charges that, as part of the consideration, she assumed and agreed to pay it. She answered, among other things, that the conveyance to her was by deed of warranty, and that, at the time of its execution, the land was encumbered by unpaid taxes. To this answer, appellees replied the general denial, and that the appellant Lucy Andrews had, as part of the consideration, agreed to pay all the taxes assessed against the land. It is said that the reply is bad; but we are not called upon to decide this question, for the reason that no demurrer was filed to any of the paragraphs of the reply. As there was no ruling upon the sufficiency of the reply, and, of course, no exception, no question is presented for our consideration. Especially must this result, where, as here, there is one paragraph of a reply which is unquestionably good.

A motion for a new trial was filed upon the ground of surprise, and of accident preventing the presence of the appellants at the trial. Counter affidavits were filed directly contradicting the statements of the affidavits filed in support of the motion. An issue of fact was thus formed, and, upon a hearing, decided against appellants. The evidence strongly supports the finding of the trial court upon this question of fact, and we can not disturb it.

If, however, we had the right to interfere with the finding upon the controverted question of fact, we should still be compelled to affirm the judgment. No diligence is shown. The failure of appellants to attend the trial is not excused. It appears that their attorneys were present when the cause was called for trial; that no effort was made to postpone the trial, nor any objection interposed to the action of the court. It was the duty of appellants to have made reasonable preparation for trial; or, if not prepared, to inform their attorneys, and thus enable them to secure a postponement. The fact that they had changed attorneys did not excuse them from notifying those formerly employed, or from informing the adverse parties and the court of such change. It would be productive of great injustice to permit parties to negligently fail to prepare for trial, and afterwards secure a new trial upon the ground of surprise.

Judgment affirmed.

No. 10,007.

GODFREY v. CRAYCRAFT ET AL.

81 476
145 699

HUSBAND AND WIFE.—*Wife's Inchoate Interest Subject to Incumbrances Existing at Time of Marriage.*—The inchoate interest acquired by the wife in real estate owned by the husband at the time of the marriage is subordinate to existing incumbrances, whether recorded or not, and whether she had notice of them or not.

PRACTICE.—*Pleading.*—*Demurrer.*—*Evidence.*—When considering the correctness of a ruling upon a demurrer, the facts averred, unaided by reference to the evidence, must be considered.

PROMISSORY NOTE.—*Interest.*—*Payment.*—*Recoupment.*—A promissory note, without any express stipulation for interest, draws six per cent. after maturity; and, payments made having been credited on the basis of ten per cent., without the maker's consent, he had the right to have the calculation made on the basis of six per cent. In such case, it is not a question of recoupment, but of payment.

From the Washington Circuit Court.

S. B. Voyles and *H. Morris*, for appellant.

W. H. Paynter and *W. C. Hultz*, for appellees.

WOODS, J.—Action by the appellant upon a promissory note and to foreclose a mortgage on real estate, alleged to have been executed to the plaintiff by the defendant William Craycraft, it being averred that since the execution of the note and mortgage, the said defendant had intermarried with his co-defendant Martha E. Craycraft, and was living with her as his wife, and that Isaac N. Williams was claiming some interest in the mortgaged land and was made a party to the action to answer thereto.

The second paragraph of the separate answer of Mrs. Craycraft to the complaint is to the effect that the mortgage which it was sought to have foreclosed purports to have been acknowledged "before Benjamin C. Shanks, recorder of Washington county, by Joseph F. Cutshaw, deputy," and that said Cutshaw had not been duly and legally appointed such deputy, the particular facts concerning his appointment being specifically stated in the plea. To this answer the court overruled the appellant's demurrer for want of facts, and the appellant has assigned error upon the ruling.

The action of the court in this respect was clearly erroneous. It was entirely immaterial, so far as concerned the right of the plaintiff to foreclose the mortgage against the mortgagor and his wife, whether the instrument was acknowledged or recorded at all. The answer contains no averment that Mrs. Craycraft had acquired any other interest in the

land than as the wife of her co-defendant, and that interest was necessarily subordinate to whatever encumbrances were upon it at the time of the marriage, whether recorded, and whether she had notice of them or not. The counsel for the appellees do not assert the contrary, but suggest that the proof shows that she was interested not solely as the wife of the mortgagor, but also as a purchaser and grantee for value of the mortgaged property. But the ruling upon the demurrer is made solely with reference to the facts averred, unaided by any enquiry as to the evidence, and in the same manner the correctness of the ruling must be considered on appeal.

In this instance the plea would not be aided by the evidence, which shows that the conveyance under which Mrs. Craycraft claimed was made subject to the appellant's mortgage.

The appellant has also assigned as error the overruling of his demurrer to the third paragraph of the answer of William Craycraft; but while it appears that such a demurrer was filed, the record before us—which is so confused in its makeup as to be hardly intelligible—does not show any ruling upon it or exception.

The remaining question is, whether the verdict for the defendants is sustained by the evidence.

The evidence shows that the defendant William Craycraft made to the plaintiff two notes, one on January 3d, 1862, for $609.28, payable December 25th, 1862, and the other, the one in suit, on January 4th, 1862, payable January 1st, 1864. Neither note contained any express contract for interest for the time, either before or after maturity.

The evidence tending to show payments was as follows:

Frank Godfrey, called for the defence, testified: "I am a son of the plaintiff; I counted the interest on the note in suit, and also on the note for $609.28, at ten per cent. from the time they were due; don't remember the amounts; William Craycraft was always present when I counted the interest on the notes, and said count it at ten per cent; * * this was

while my father lived on the farm, two miles from town; my father always gave Craycraft a receipt when he paid money; I can't recollect how much or how often he paid; * * I do not recollect testifying on the first trial of this cause that I counted the interest from the date of the notes."

William Craycraft testified: "I made the note and mortgage in suit, also the note for $609.28, and the mortgage which secures it; * * I think the first payment I made was about one year after the notes were executed; * * a little over one hundred dollars; * * the next year one hundred dollars; * * and the next year one hundred and forty-four dollars; * * these were all the payments I can now recollect; I had receipts for the payments I made, but my house was destroyed by fire, and the receipts burned; I never was present when the interest was calculated on the notes; I never knew what interest he charged me; a short time after I paid the $144, * * Godfrey * said, 'You come out better than than I expected; you have paid all the interest, and about one hundred and ten dollars over;' in 1871, when the last payment was made, Godfrey said: 'You are in the notion of getting out of debt;' there were two payments after the mortgage which secured the first note was satisfied, one for fifty dollars and one for one hundred dollars; I could count interest; * * James Godfrey could not; I was justice of the peace for several years."

The satisfaction referred to was made May 28th, 1870.

The defendants introduced in evidence the following memorandum:

"Interest and principal due on the William Craycraft notes up till December 25th, 1868, $802.98; Salem, June 12th, 1869, received of William Craycraft, on the above account, $350; received on William Craycraft note, fifty dollars, May 28th, 1870; received on the within note, $100, Dec. 26th, 1871."

This evidence tends to show that besides the particular payments stated by the witness, other payments were made be-

tween January 1st, 1865, and December 25th, 1868, which, on the basis of ten per cent. on the notes from the time each became due, left unpaid on both notes at the last named date the sum of $803. A calculation will show that the same payments which, on the basis of ten per cent. interest, would produce that result, on the basis of six per cent. interest would have reduced the amount due at that time by as much as $350 to $400, according to the supposed dates and amounts of the payments. There was, therefore, in fact only about $450 due at that time, which sum, with six per cent. interest, was not equal to the payments thereafter made, to wit: June 12th, 1869, $350, May 28th, 1870, $50, and December 26th, 1871, $100.

Counsel for the appellant contend that the ten per cent. interest, having been voluntarily paid, can not be recouped, especially so much of it as was not paid on the note in suit. The question, however, does not arise upon the evidence which tends to show that the maker of the note was not present at, and did not know of, or give his assent to the computation of interest at any other rate than that which the contracts called for, and, this being so, it is a question of payment simply, and not of recoupment. It being evident that the finding in favor of the principal defendant, the maker of the note and mortgage, can not be disturbed, the error committed in overruling the demurrer to Mrs. Craycraft's answer is immaterial and harmless. Judgment standing in favor of her husband, there can not, under the facts of the case, be a judgment against the wife.

Judgment affirmed, with costs.

81 480
121 518
81 480
142 349

No. 10,080.

GAVIN *v.* BOARD OF COMMISSIONERS OF DECATUR COUNTY.

APPEAL.—*County Commissioners.*—*Practice.*—An appeal from the order of a county board levying a tax in aid of a railroad goes to the circuit court, not for the correction of errors, but for trial as an original cause; objec-

tions filed there, in the nature of an assignment of errors, should be wholly disregarded, and the party appealing can make no question in the Supreme Court concerning the ruling of the circuit court upon them.

RAILROAD.—*Tax.*—*Public Aid.*—*Evidence.*—In July, 1879, a petition was presented to the county board asking an appropriation for a township of $75,000, to aid a railroad, as provided by the statute (R. S. 1881, sec. 4045). An election was held and the appropriation voted. In June, 1880, the board levied a tax of one per cent. accordingly. In June, 1881, another levy of one per cent. was ordered, and on trial of an appeal from this last order the appellant offered to prove that a tax of one per cent. for the years 1880 and 1881 would not raise the $75,000.

Held, that the evidence was immaterial.

Held, also, that the appeal raised no question upon the proceedings occurring before the order appealed from.

JUDGMENT.—*Assignment of Error.*—*Supreme Court.*—When the judgment appealed from is defective and incomplete, but no error is assigned thereon, and no available error has been committed in the proceedings which led to it, it will not be reversed.

From the Decatur Circuit Court.

J. D. Miller and *F. E. Gavin*, for appellant.

W. A. Moore, B. F. Bennett, C. Ewing and *J. K. Ewing*, for appellee.

NIBLACK, J.—The board of commissioners of Decatur county, on the 10th day of June, 1881, which was during their regular June session of that year, made and caused to be entered of record, an order as follows:

"Vernon, Greensburg and Rushville R. R. Co.

"Levy of taxes for Washington township.

"Whereas, on the 19th day of July, 1879, a petition by twenty-five freeholders of Washington township, of Decatur county, Indiana, was filed in the auditor's office of said county, asking an appropriation of $75,000 for the purpose of aiding in the construction of the Vernon, Greensburg and Rushville railroad through said township, by taking stock in said company for said township, in the sum of $75,000; and whereas an election was held in said township, on Monday, August 25th, 1879, which resulted in a majority of votes of said township for said appropriation.

"Therefore, it is hereby ordered that a special tax of one per cent. upon the real and personal property of said township be and the same is hereby levied for the year 1881, for the purpose of raising one-half of the amount specified in said appropriation."

Within thirty days after the making and entry of this order, Frank E. Gavin, a citizen of said township of Washington, and a property-holder and taxpayer therein, filed his affidavit with the auditor, setting forth an interest in the subject-matter embraced in the order, and alleging that he was aggrieved by the decision of the commissioners in relation thereto, and, upon the filing of an appeal bond, prayed an appeal to the circuit court.

The auditor in due time filed a transcript of the proceedings appealed from in the circuit court, in which the cause was placed upon the docket, the appellant being designated as the plaintiff, and the commissioners as defendants.

At the next term of the circuit court, the plaintiff Gavin filed what he denominated a statement of his grounds of appeal, urging as objections to the proceedings had before the commissioners:

1st. That said commissioners were not lawfully in session when they received the petition and ordered the election respectively referred to in the order appealed from.

2d. That the commissioners were not authorized to levy the taxes complained of, or any other taxes, at their regular June session of 1881.

3d. That the commissioners at their June session, in the year 1880 levied the sum of $34,477.10, of said sum of $75,000 referred to in the order appealed from, to aid in the construction of said Vernon, Greensburg and Rushville railroad; that the taxable property of said Washington township assessed for the year 1881, was $3,533,660; that such levy of one per cent. for the last named year would not raise the residue of said $75,000, but would fall short thereof by the sum of $5,186.30.

The defendants demurred severally to the objections thus

urged to the proceedings appealed from, and their demurrer was sustained as to the second and third objections, and overruled as to the first.

The defendants then joined issue upon the first objection and the cause was submitted to the court for trial.

The plaintiff read in evidence the precept of the auditor convening the commissioners in special session on the 19th day of July, 1879; also the record of a petition filed on that day purporting to be signed by twenty-five freeholders of Washington township, asking the appropriation of $75,000 as herein above stated; also the order of the commissioners directing an election to be held in that township on the subject of the proposed appropriation on the 25th day of August, 1879; also the order of the commissioners made at their June session of 1880, directing a levy of one per cent. on the taxable property of Washington township for that year, purporting to be made in pursuance of the requirements of a majority vote of the voters of that township on said 25th day of August, 1879.

The plaintiff then offered evidence tending to prove the assessed value of the taxable property in Washington township for the years 1880 and 1881 respectively, for the purpose of showing that one per cent. levied on such taxable property for each of those years would not raise the sum of $75,000 voted as an appropriation by the voters of said township, but the court excluded the proffered evidence.

The defendants on their part read in evidence the return of the election held on the 25th day of August, 1879, showing that a large majority of the persons voting at that election had voted in favor of the appropriation asked for in the petition read in evidence by the plaintiff.

The court thereupon made a general finding for the defendants, and, over a motion for a new trial, rendered judgment in their favor for costs.

Errors are assigned upon the rulings of the circuit court sustaining demurrers to the second and third grounds of appeal

from the proceedings before the commissioners as stated by the appellant, and upon the overruling of the motion for a new trial.

The proceedings in this cause in the circuit court were quite informal and in some respects anomalous, having been conducted partly upon the idea that the circuit court was sitting as a court of error for the review of the proceedings had before the commissioners, and partly upon the theory that the cause stood for trial in that court as an original action.

The final judgment also settled nothing as to questions really brought before the court by the appeal, except in an inferential and argumentative way, and did not make such a final disposition of the cause as the court was, under the circumstances, required to make.

In the first place, the appeal to the circuit court was only from the order of the commissioners made and entered at their June session of 1881, and raised no question in that court on any of the previous proceedings on the subject to which that order related.

In the next place, that appeal brought the cause into the circuit court to be heard, tried and determined upon the evidence as an original cause, and not for review and re-examination as in a court of errors. 1 R. S. 1876, p. 357, section 36; *McPherson* v. *Leathers*, 29 Ind. 65; *Mandlove* v. *Pavy*, 33 Ind. 505.

Consequently, the statement by the appellant of his grounds of appeal in the circuit court raised no question for decision in that court, and brought nothing into the record for our decision here.

The appeal to the circuit court suspended the order appealed from, and transferred the question as to whether a tax ought to be levied on the taxable property of Washington township, for railroad purposes, for the year 1881, to that court, to be determined upon the evidence as an original question. Hence, one of the questions, to which the appellant has devoted much time in the argument, and that is, as to the time at which the commissioners were authorized to levy such a tax in

the year 1881, became an immaterial question in the circuit court, and is one of no practical importance in this court.

The records of previous proceedings by the commissioners, read in evidence by the appellant, tended to show an obligation on the part of the proper authorities of Decatur county to make a levy of taxes on the property of Washington township, to pay the balance claimed to be due on the appropriation of $75,000, and as the appellant introduced those records in evidence, he can not now be heard to complain that they were improperly admitted in evidence.

The assessed value of the taxable property of Washington township, for the year 1879, the time at which the appropriation was voted, was not shown. We, therefore, assume that the amount voted did not exceed two per cent. on such taxable property for that year.

The assessed value of the taxable property of that township in the succeeding years was immaterial to any question before the court, and the court did not err in excluding all inquiry on that subject. If, on account of the shrinkage of values, or some defects in the assessments, or of some destruction of property, a levy of one per cent. each year for the years 1880 and 1881 would not make the sum appropriated, no citizen of the township could interpose that circumstance as a reason for not levying the per centum provided by law for the payment of such appropriation.

The statute under which this cause was appealed from the commissioners, required that the circuit court should make a final determination of the matters in controversy, and either carry such final determination into execution, or remand the cause with instructions to the commissioners. 1 R. S. 1876, p. 357, section 37; *Mandlove* v. *Pavy*, *supra*.

The judgment in this case made no order concerning the levy of taxes appealed from, and hence did not make a complete final disposition of the cause; but as no material error was committed against the appellant during the progress of

the cause, he is not in a position to demand a reversal of the judgment, however defective in some respects it may be.

The judgment is affirmed, with costs.

81 486
126 354

No. 8414.

STATE, EX REL. NAVE, *v.* HAWKINS ET AL.

PLEADING.—*Sheriff's Bond.—Answer.—Direction Not to Levy.*—Complaint on a sheriff's bond, stating for breach: 1. Failure to levy an execution; 2. Refusal to levy on personal property when directed, and levying on real estate encumbered beyond its value. Answer, that the sheriff, being about to levy the execution on personal property, was directed by the execution plaintiff not to make such levy, but to levy upon the real estate of the execution defendant, which was accordingly done.

Held, that the answer was good on demurrer.

SAME.—*Duplicity.*—Under the code, duplicity is not cause for demurrer.

EVIDENCE.—*Record.—Bill of Exceptions.*—As evidence, a record of court is an entire thing, and all proper parts of it are to go in evidence if any of it be admitted; but this does not include bills of exceptions and other papers incidentally connected with the proceedings.

SAME.—*Objection.—Practice.*—An objection to reading a record in evidence raises no question as to the reading of a bill of exceptions connected with the same proceedings, and filed therein.

SUPREME COURT.—*Harmless Error.—Evidence.*—Error in admitting evidence, which it is apparent could not have influenced the verdict, is not available in the Supreme Court.

From the Hendricks Circuit Court.

C. C. Nave, for appellant.

L. M. Campbell, for appellees.

ELLIOTT, C. J.—The appellant's complaint charges the appellee Hawkins with having broken the condition of the official bond executed by him as sheriff of Hendricks county. Two breaches are assigned. The first is, that the appellee Hawkins negligently failed to levy an execution issued upon a judgment obtained by the relator against one Mahoney; the second that the sheriff, although so directed, refused to

levy the execution upon personal property and wrongfully levied it upon real estate encumbered for more than its value.

The second paragraph of the answer is not very carefully drawn, but it contains an allegation which makes it good. The allegation to which we refer is this: "These defendants admit that it is true that no levy was made upon the personal property, but they aver that said Samuel L. Hawkins offered and intended to levy upon said personal property, and would have so levied upon the same and taken it into his possession, and have offered the same for sale as required by law, but that the relator upon being notified of the condition of said property, expressly ordered and directed said Samuel L. Hawkins not to make such levy, and ordered him to levy upon the real estate of said Mahoney." Confessing this allegation by the demurrer, the appellant admits that the sheriff did exactly what the relator required him to do, and this being true there is no cause of action. An execution creditor can not successfully insist that a sheriff who obeys his orders shall respond in damages, because loss resulted from such obedience. The appellant's relator is not in a situation to complain of the sheriff for having done that which he was directed to do.

Counsel for appellant is right in his assertion that the answer contains more than one ground of defence, but he is radically wrong in his conclusion that, therefore, a demurrer will lie. Where the answer improperly blends in a single paragraph different and distinct grounds of defence, the remedy is not by demurrer but by motion.

In the course of the trial the appellant gave in evidence detached parts of various records, and the appellees afterwards gave in evidence the remaining parts of these records. There was no error in permitting the appellees to do this. The rule is that all of the record, and not merely fragmentary parts, shall be put in evidence. As said in *Miles* v. *Wingate*, 6 Ind. 458, "A record is an entire thing, and if admissible for any purpose, all its parts are received." *Coats* v. *Gregory*, 10 Ind. 345; *Foot* v. *Glover*, 4 Blackf. 313; *McNutt* v. *Dare*,

8 Blackf. 35; *Jenkins* v. *The State*, 78 Ind. 133; 1 Taylor Ev. 657. This rule applies only to such matters as are legitimately a part of the record, and not to mere collateral papers incidentally connected with the proceedings.

Appellees were permitted to put in evidence the record of an action of replevin brought against the sheriff. The property replevied had been seized upon an execution issued on the relator's judgment, and we think the evidence was admissible for the purpose of showing why there had been no sale of this property, why it was useless to again seize it upon execution, and how the levy had been disposed of. The judgment was not conclusive against the relator, for he was not a party, nor was he notified to defend, but it was evidence of the fact that, by judicial process, the property was taken from the sheriff. The case is closely analogous to that of *Rhode* v. *Green*, 26 Ind. 83, where it was held that it is competent for the plaintiff, in an action for a breach of the covenant of seizin, to give in evidence the judgment obtained against him by the claimant, although his grantor was not a party. *Wilson* v. *Peelle*, 78 Ind. 384.

The bill of exceptions filed in the action of replevin brought against the sheriff was not such a part of the record as entitled it to admission. Where a bill of exceptions is filed for the purpose of exhibiting the evidence, it does not become a part of the record in the sense that the pleadings and entries upon the order book and dockets do. The pleadings and entries are necessarily a part of the record; indeed, they in strictness constitute the record. Without them, the admissions and allegations of the parties could not be understood, nor the scope and effect of the judgment be fully apprehended. This is not true of the bill of exceptions. The office of the bill of exceptions is altogether different from that of the entries and pleadings. In truth, a bill of exceptions is only proper when it becomes necessary to make some fact or proceeding appear which strictly and properly forms no part of the record. It was not competent for the appellees to read the bill of excep-

tions under mention in evidence, but, notwithstanding this error, we can not reverse the judgment. Under the issues and evidence, the reading of the bill could not have done the appellant any injury. But if this were not so, his objection was not properly stated. The objection stated and reserved was not such as presented the question of the admissibility of the bill of exceptions, but was directed entirely to the competency of every part of the record.

We have given the evidence a careful examination, but find no reason which will warrant us in departing from the settled rule that the finding of the trial court will not be set aside where there is evidence sustaining it.

Judgment affirmed.

Opinion filed at the November term, 1881.

Petition for a rehearing overruled at the May term, 1882.

No. 8893.

DUNN ET AL. *v.* HUBBLE.

SUPREME COURT.— *Record.— Filing of Bill of Exceptions.*—Where time is given beyond the term, in which to prepare and file a bill of exceptions, the record must affirmatively show that it was not only signed but *filed* within the time limited, or it will not be considered by the Supreme Court as constituting a part of the record.

From the Hamilton Circuit Court.

W. Neal and *J. F. Neal*, for appellants.

T. J. Kane and *T. P. Davis*, for appellee.

HOWK, J.—This was a suit by the appellee against the appellants, in a complaint of two paragraphs. The first paragraph counted upon a promissory note for four hundred and two dollars, executed by said Madison L. Dunn, and payable to the appellee, and alleged to be due and wholly unpaid. In

the second paragraph of her complaint the appellee sued upon the same note, alleging that it was given for the unpaid purchase-money of certain real estate, particularly described, in Hamilton county, claiming a vendor's lien on such real estate, as security for the payment of the note and interest, and praying that such lien might be enforced by the judgment of the court. The cause was put at issue and tried by the court, and a finding was made for the appellee; and over the appellants' motion for a new trial, and their exception saved, the court rendered judgment accordingly.

The overruling of their motion for a new trial is the only error assigned by the appellants in this court. The causes assigned for such new trial were, that the finding of the court was not sustained by sufficient evidence, and was contrary to law, and that the court erred in rendering judgment for so large an amount.

It will be readily seen, that these causes for a new trial will present no question for the decision of this court, if it can be said, as the appellee's counsel claim, that the evidence on the trial below is not in the record. The record shows that, upon the rendition of the judgment, the appellants were given ninety days in which to file their bill of exceptions; and the transcript contains what purports to be a bill of exceptions containing the evidence. But the point is made by appellee's counsel, and we think it is well made, that there is no record of the court, statement of the clerk, or other evidence in the record, that the bill of exceptions was filed within the time allowed by the court, or, indeed, that it was ever filed at any time. "It is settled that where time is given extending beyond the term, in which to prepare and file a bill of exceptions, the record must affirmatively show that it was not only signed but filed within the time limited, or it will not constitute a part of the record; and it is not sufficient that the clerk certify that the filing of the bill was within the time given, but he must certify the date of the filing, so that the Supreme Court may determine whether it was within

the time given." Buskirk's Practice, p. 144, and cases cited. *Sherlock* v. *The First National Bank of Bloomington*, 53 Ind. 73.

We are of the opinion, therefore, in the case now before us, that the bill of exceptions, purporting to contain the evidence, does not constitute a part of the record. In the absence of the evidence, we can not say from the record, that the court erred in overruling the appellants' motion for a new trial for any of the causes assigned therefor. All the presumptions are in favor of the decision of the trial court, until and unless it is shown by the record to have been erroneous, and, therefore, we are bound to say, in this case, that the court committed no apparent error in overruling the motion for a new trial. *Myers* v. *Murphy*, 60 Ind. 282; *Stott* v. *Smith*, 70 Ind. 298; *Bowen* v. *Pollard*, 71 Ind. 177.

The judgment is affirmed, with costs.

Opinion filed at the November term, 1881.

Petition for a rehearing overruled at the May term, 1882.

No. 9360.

Brown v. Fodder et al.

81 491
147 397

81 491
165 280

Taxes.—*Invalid Tax Sale Lien.—Statute of Limitations.*—The right of a purchaser at an invalid tax sale to enforce a lien against the land is barred by the lapse of fifteen years, not by the five years' limitation prescribed in the 250th section of the assessment law, for an action to recover the land itself. Acts 1872, p. 117; 1 R. S. 1876, p. 127.

Same.—*Subsequent Taxes.—Voluntary Payment.*—When the right to enforce a lien upon land for the amount bid at an invalid tax sale, has been lost by lapse of time, a subsequent payment of taxes on the land will be deemed a voluntary payment, furnishing no cause of action, and ineffective to restore the original right.

Same.—*Pleading.—Limitation.—Evidence.*—When, under a complaint in ejectment, the plaintiff seeks, under sections 256 and 257 of the assessment law of 1872, Acts 1872, p. 119, 1 R. S. 1876, p. 129, to enforce a lien for the amount of his bid at an invalid tax sale, the answer of general denial admits proof of all defences, including the statute of limitations.

From the Spencer Circuit Court.

G. L. Reinhard and *W. H. Thomas*, for appellant.
C. H. Mason and *R. S. Hicks*, for appellees.

WOODS, J.—The appellant sued to recover possession of real estate. The defendant answered by the general denial, and upon the trial it was found and adjudged that the plaintiff should take nothing by the suit. The only question is whether the finding was according to the law and the evidence.

The evidence shows, without conflict or dispute, that the appellant purchased a part of outlot No. 6 in William R. Haynes' donation to the town of Rockport, in Spencer county, Indiana, on the 3d day of January, 1859, at a sale made for delinquent taxes assessed thereon, and received a certificate of purchase; that on the 6th day of December, 1875, he filed an affidavit with the auditor of the county, setting forth the fact of his having purchased the land described in the complaint at said sale and having received a certificate thereof; that the certificate had been lost, and asking the auditor to make him a deed, which the auditor then did make; that on the 15th day of January, 1880, the appellant paid to the treasurer of the county the further sum of $34, taxes then due upon said land; and other than these the appellant took, so far as is shown, no step to enforce his right or claim against the land until December 18th, 1880, when he commenced this action.

It was admitted that the appellee Sarah Fodder obtained title by a conveyance made January 26th, 1864, by John Harris, who had derived his title from a prior owner by a deed made in 1862, and that, when the appellee received her deed, she had no actual notice of any lien for unpaid taxes, or of the sale for delinquent taxes.

Conceding that under sections 256 and 257 of the act for the uniform assessment of property, approved December 21st, 1872, as interpreted in *Flinn* v. *Parsons*, 60 Ind. 573, and *Duke* v. *Brown*, 65 Ind. 25, the appellant was entitled to relief, unless his cause of action was barred by the statute of limitations, we are of opinion that the bar was complete.

The tax sale was made on the 3d day of January, 1859, and the sale being conceded to have been unlawful, the purchaser's lien and his right to enforce it against the land became complete at once. By section 229 of the act of 1872, if the conveyance shall prove to be invalid for any cause other than those enumerated in previous sections, "the lien which the State has on such lands shall be transferred to and vested in the grantee, his heirs and assigns, who shall be entitled to recover from the owner of such land the amount of taxes, interest and penalty, legally due thereon at the time of sale, with interest, together with the amount of all subsequent taxes paid, with interest, and such lands shall be bound for the payment thereof." Similar provisions were contained in the prior laws for the assessment and collection of taxes.

They are simply declaratory of the equitable doctrine of subrogation, and while the language is, "If any *conveyance* for taxes shall prove to be invalid," etc., it is manifest that if the sale is invalid, the purchaser need not go through the formality of taking a conveyance, unless for the purpose of entitling himself to the 25 per cent. interest provided for in sections 256 and 257 of the law; but, under section 228, may have his money refunded out of the county treasury, or may proceed to enforce his lien against the land.

The question arises, what limitation of time will bar the action to enforce this lien? Under section 250 of the assessment law of 1872, "No action for the recovery of real property sold for the non-payment of taxes shall lie, unless the same be brought within five years after the date of the sale," etc.; but while the appellant's action was, by the form of his complaint, an action for the recovery of the land, he had the right, under sections 256 and 257, his title being invalid, to obtain, under that complaint, a decree for the enforcement of his lien, and, in respect to this right, we are of opinion that the limitation is not five years, as provided in section 250, but fifteen years, under the general statute of limitations. Code 1852, section 212, R. S. 1881, section 294.

From January 3d, 1859, the date of his purchase, until December 6th, 1875, when he obtained the auditor's deed, the appellant took no step, and did not institute this action until the 18th day of December, 1880, having on the 15th day of January, 1880, made his only payment of taxes on the land after the date of his purchase.

Whether, therefore, the statute of limitation be regarded as having commenced to run from the date of the sale, or from the end of two years thereafter, when the appellant might have claimed his deed, the period had fully run, and the appellant's rights were barred before the making of said payment of taxes as well as before the commencement of the action.

Waiving any consideration of the question whether there can be a lien in favor of the purchaser for taxes subsequently paid, disconnected from a right to enforce the lien obtained at the time of the purchase, we are of opinion that the appellant has no lien for the amount which he paid in January, 1880. When that payment was made, his original claim was already completely barred, and he had no lien upon or interest in the land which it was necessary or proper for him to protect, and consequently the payment was essentially a voluntary one; by itself it affords no cause of action, and can not be deemed to restore or keep alive the original cause. It follows that the finding and judgment of the circuit court were right, if under the issue as formed the statute of limitation was available to the appellee, as we think it was.

The plaintiff chose to frame his complaint according to the customary form of a complaint in ejectment or for the recovery of real estate, and under this complaint, by virtue of statutory provisions already referred to, he was entitled to enforce a lien upon the land for the amount due him as purchaser at an invalid tax sale. The only statute of limitation pertinent to his complaint is the twenty years' provision; while, as we have seen, the special relief which the appellant claimed on the trial is barred by the lapse of fifteen years. If, however, the fifteen years' limitation had been pleaded to

the complaint, it would have been on its face irrelevant and demurrable. The complaint being for the recovery of the land, by force of the code of 1852, sec. 596, R. S. 1881, section 1055, all matters of defence, including the lapse of time sufficient to bar the action, were admissible under the general denial. The appellee was not bound to know, and will not be presumed to have known, that the purpose of the plaintiff was to enforce a tax lien; and if he did in fact know, he could only plead to the complaint according to the nature of the cause of action set forth in it. It follows that unless the defendant in such a case can have the benefit of the statute without special plea, he can not have it at all, a result which was certainly not intended. We conclude, therefore, that when, under a complaint for the recovery of the land itself, the plaintiff seeks to enforce a tax lien under the statutes referred to, instead of setting out specifically his cause of action according to its true nature, the defendant under an answer in denial may have the benefit of the statute of limitation or other special defence, as if specially pleaded.

Judgment affirmed, with costs.

No. 8286.

Langohr v. Smith et al.

Cities.—*Street Assessment.—Sale Under Precept.—Misdescription.—Mistake.—Action to Quiet Title.—Evidence.*—Under the statute, R. S. 1881, sec. 3165, a city clerk has no authority to issue a precept for the collection of an assessment for street improvement without an order of the council, and a sale under it is absolutely void; and in a suit by a purchaser under a precept against lot 20, to quiet his title, a record of the council proceedings, showing a precept ordered against lot 52, is not admissible, nor is parol evidence admissible, showing that the council intended to order the precept against lot 20.

Same.—*Deed.—Recitals.*—Where the evidence *aliunde* shows recitals in a

deed executed pursuant to a sale under a precept for the collection of an assessment for street improvements to be false, the recitals can not be deemed to be true.

EVIDENCE.—*Bill of Exceptions.*—In order to present a question to the Supreme Court concerning the refusal to admit documentary evidence, the documents rejected must appear in the record by bill of exceptions.

TAXES.—*Tax Title.—Lien.—Auditor's Deed.—Action to Quiet Title.—Harmless Error.*—Where a suit to quiet title is founded upon a purchase of lands for taxes, and there is no evidence of such proceedings as authorize a conveyance, there is no available error in refusing to admit the auditor's deed in evidence, where the judgment rendered gives the plaintiff a lien for the taxes paid by him.

NEW TRIAL.—*Practice.—Damages.*—The Supreme Court can not consider any question as to the inadequacy of damages given, unless it has been assigned as cause for a new trial.

DEED.—*Description.—Evidence.*—Proof in explanation, that the words in a deed "north part of" a lot meant the "north half" of it, is inadmissible, where it is not shown that the words have a peculiar or technical meaning.

From the Allen Circuit Court.

A. Zollars and *F. T. Zollars*, for appellant.

S. F. Swayne and *P. V. Hoffman*, for appellees.

ELLIOTT, J.—Appellant, in the first paragraph of his complaint, claims title to lot 20 in Brackenridge's addition to the city of Fort Wayne, by virtue of a deed executed to him by the city treasurer upon a sale on a precept issued for the collection of an assessment for a street improvement.

On the trial, appellant introduced in evidence various proceedings of the common council, and offered the following extract from the corporate record: "The clerk submitted the affidavit of John M. Langohr for grading and gravelling alley between McClellan street and Ewing street, from Lewis street to George street, and praying that a precept be issued against lot No. 52, Brackenridge's addition, owned by Frederick Hilgeman, for the sum of $5.52, which affidavit was received and ordered placed on file, and the clerk ordered to issue precept prayed for." Appellees objected to the introduction of the evidence on the ground that the order to issue a precept was directed against lot 52, and not against lot 20, and the objec-

tion was sustained. The ruling was right. The order was directed against property not claimed by the appellant, and could not be used to support title to that claimed by him. Evidence that a precept was ordered against lot 52 was no evidence of any right in the claimant to lot 20.

The court was not bound to examine other proceedings in order to ascertain whether a mistake had been made in describing the lot. The face of the order exhibited no mistake, nor was there any apparent ambiguity, and the court had no right to resort to other parts of the record to discover whether the order was in fact directed against lot 20, instead of lot 52, as the order itself declared. We are not dealing with the case of one seeking by a direct proceeding to have a record corrected, but with a case in which a claimant of real estate is endeavoring to show that an order which, in plain terms, describes lot 52, really meant lot 20. We must, in such an action as the present, take the order as we find it, and not as it may be supposed by counsel to have been intended to read.

Appellant offered to introduce oral evidence to prove that the clerk by mistake used the figures 52 instead of the figures 20, in the order for the precept. There was no error in excluding this evidence. There are cases holding that where corporate proceedings are actually had and no record made, parol evidence may be given. This rule, however, does not go to the extent claimed by the appellant. Where a record is made, that is the best evidence, and must be adduced. It is clear that the evidence was not competent.

The mistake of the clerk can not be corrected upon the trial of an action to quiet title. The common council, so far as appears of record, ordered a precept against lot 52, and this order can not be set aside or corrected upon evidence that the clerk made a mistake in reporting the affidavit. The judgment of the council was based upon the report, and as their order went against lot 52, that order must stand until, by a direct proceeding, the proper correction is made. It has been

held in several cases that the proper procedure is to commence back of the error and proceed anew from that point forth, and we regard this case as fully within the principle established by our cases.

In discussing the question whether it was necessary for appellant to show an order of the common council directing the precept to issue, counsel liken the case to that of one claiming title through a sheriff's sale. Counsel are in error in assuming that the cases are analogous. The proceedings in street assessments are wholly *ex parte*. The corporate authorities exercise a naked statutory power. The proceedings are in the nature of assessments for taxation. It is a familiar principle, that, in such cases, there must be a strict compliance with the statute. Where one claims title, it devolves upon him to show the existence of the authority, and its due exercise. He can not invoke the aid of the presumption in favor of official conduct. If he would secure title to the property of the adjoining proprietor, he must prove that the officers have obeyed the requirements of the statute; he can not ask the courts to presume that they have done so.

The city clerk is a ministerial officer, and has no authority to issue precepts, unless directed by the common council. The power to order precepts is lodged with that body, and a precept not ordered by it is invalid. Without an order from the common council, no valid precept can issue, and without a valid precept, no sale can be made.

It is argued that the failure to order a precept rendered the sale merely voidable, and that the property-owner's remedy is by appeal. Counsel forget that they are seeking not to collect the assessment, but to secure title. The question is not whether the appellees can escape the payment of the assessment, but whether the appellant can acquire their property. If the question were as to whether the appellees could successfully resist the collection of the assessment, not having pursued the remedy provided, there would be much force in the argument. No such question, however, is presented.

It will not do to rest such a case as this upon the principle which prevails where a clerk irregularly issues an execution. The distinction between the two classes of cases is obvious. The city clerk has no authority whatever to issue a precept without an order of the common council; the county clerk needs no order of court, he may issue upon the request of the judgment plaintiff. Proceedings in street assessments are not ordinary adversary proceedings; they stand on an altogether different footing, and are governed by radically different rules. If one were searching for analogies, he would go to cases treating of taxation and tax titles, rather than to those regarding executions and execution sales.

It is maintained that the deed is *prima facie* evidence of the recitals contained in it, and that the recital that the council ordered the precept to issue entitled appellant to recover. We need not, and do not, decide how far the recitals of such a deed are evidence, for the reason that the evidence clearly shows that no precept was ever ordered to issue against the real estate in controversy. Conceding to the deed the full force claimed for it, the evidence disproves the truth of its recital as to the order of the common council.

The second paragraph of the appellant's complaint claims title to the property by virtue of a tax sale.

The court, as the record recites, refused to admit certain documentary evidence offered by the appellant, but the documents are not set forth in the bill of exceptions. We are unable to determine the character of the excluded evidence, for the reason that it is not exhibited by the record. Documentary evidence offered and excluded should be set out, so that it may be inspected, and its competency or incompetency ascertained. *Vanderkarr* v. *The State*, 51 Ind. 91; *The Indianapolis, etc., R. R. Co.* v. *Irish*, 40 Ind. 277.

The appellant offered in evidence the deed executed to him by the auditor, but the court refused to receive it. We think there was no available error in this ruling. The deed alone would not have entitled him to a recovery, for without evi-

dence that proceedings were had warranting its execution, it would not create title. The court adjudged a lien in appellant's favor for the taxes paid by him, and the deed could not possibly have secured him greater relief if it had gone in evidence, and its exclusion, therefore, did him no injury.

Whether the sum assessed in appellant's favor was or was not sufficient, is a question we can not consider, for the reason that error in the assessment of damages is not assigned as a cause for a new trial. It is settled that no question as to the assessment of damages, or of the amount of recovery, can be considered on appeal, unless assigned as one of the grounds on which a new trial is asked.

There was no error in refusing to permit the appellant to prove that the words "the north part of" meant the "north half" of a lot. The words "north part" are not terms of art or mystery, and it was not shown that they had any peculiar or technical meaning.

Judgment affirmed.

81 500
145 532

81 500
150 430

81 500
161 396

No. 8848.

State, ex rel. Collings, Prosecuting Attorney, v. Beck et al.

Corporations.—*Information.*—*Quo Warranto.*—An information under the third clause of section 1131, R. S. 1881, is sufficient if it appear therefrom that the defendants pretend to be organized as a corporation, and are exercising corporate powers, when they are not so organized as the law requires.

Same.—Whether corporators intend, in good faith, to carry out the purposes of their organization, can not be questioned by *quo warranto*.

Turnpike Company.—*Organization to Purchase Roads.*—*Statute Construed.*—To organize a turnpike company under the statutes (R. S. 1881, sections 3624 and 3658), there must be a substantial compliance with the requirements prescribed. There can be no such organization for the purpose of purchasing, etc., two or more distinct roads already existing, and owned by different corporations.

State, *ex rel.* Collings, Prosecuting Attorney, *v.* Beck *et al.*

SAME—*Subscription by Initial of Christian Name.*—Articles of association for the formation of a turnpike company may be subscribed by the corporators, by their usual signatures, and the use of initials to designate their Christian names is not objectionable.

SAME—*Estoppel.*—That the State has instituted a criminal prosecution for breaking down a toll-gate, described in the indictment as the property of a corporation named, is no bar to an information to contest the valid organization of the supposed corporation.

From the Montgomery Circuit Court.

G. W. Collings, Prosecuting Attorney, *G. W. Paul* and *J. E. Humphries*, for appellant.

P. S. Kennedy, *W. T. Brush* and *E. C. Snyder*, for appellees.

BLACK, C.—This was an information, filed on the 9th day of May, 1879, on the relation of the prosecuting attorney, against the appellees, Robert F. Beck and seven others.

The information was in two paragraphs, to each of which the appellees severally demurred. The demurrer was overruled as to each paragraph, and the appellees excepted. The appellees answered in five paragraphs, the third being a general denial. The appellant demurred to the first, second, fourth and fifth paragraphs of the answer. The demurrer was sustained to the fourth and fifth paragraphs, the appellees excepting, and was overruled as to the first and second paragraphs, the appellant excepting. The appellees withdrew their general denial, and the appellant moved for judgment in her favor, upon the state of the pleadings. This motion was overruled, and the appellant excepted. The appellant declined to reply to the first and second paragraphs of answer, and elected to stand by the demurrer thereto, and judgment was thereupon rendered against the appellant for costs, the appellant excepting to the rendering and entering of the judgment.

The appellant has assigned as error the overruling of the demurrer to the first and second paragraphs of the answer, the overruling of the motion for judgment in appellant's favor upon the state of the pleadings, and the rendition of the judg-

ment against the appellant and in favor of the appellees for costs.

There is a cross assignment of errors upon the action of the court in overruling the demurrer to the several paragraphs of the information, and in sustaining the demurrer to the fourth and fifth paragraphs of the answer.

This proceeding is based upon the following statutory provisions:

"An information may be filed against any person or corporation in the following cases: * * * *Third.* Where any association or number of persons shall act within this State as a corporation, without being legally incorporated." 2 R. S. 1876, p. 298, section 749.

"The information may be filed by the prosecuting attorney in the circuit court of the proper county upon his own relation," etc. 2 R. S. 1876, p. 299, section 750.

"The information shall consist of a plain statement of the facts which constitute the grounds of the proceeding addressed to the court." 2 R. S. 1876, p. 299, section 751.

The information is long and somewhat loosely prepared. Upon a careful examination, we conclude that each paragraph alleges with sufficient certainty that the defendants have pretendingly organized themselves as a corporation, under the name of The Crawfordsville and Eastern Turnpike Company, and are acting within this State as a turnpike corporation, particular acts being specified, as erecting toll-gates upon certain roads in Montgomery county, which for many years have been public highways, and exacting toll from travellers thereon, upon a claim of being such corporation. Each paragraph alleges, in different forms, that the defendants have not been legally incorporated.

The first paragraph alleges many facts which are also set forth in the first and second paragraphs of the answer, and, in view of what we shall say of these paragraphs, we need not further refer to the information. We think each paragraph thereof stated facts sufficient to constitute a cause of action.

The appellees in the first and second paragraphs of their answer seek to show that they are legally incorporated as a turnpike company. The statutes with which they attempted to comply are as follows:

"*Be it enacted*," etc., "That any number of persons may form themselves into a corporation for the purpose of constructing or owning plank, macadamized, gravel, clay and dirt roads, by complying with the following requirements: They shall unite in articles of association setting forth the name which they assume, the line of the route, and the place to and from which it is proposed to construct the road, the amount of capital stock, and the number of shares into which it is divided, the names and places of residence of the subscribers, and the amount of stock taken by each, shall be subscribed to said articles of association. Whenever the stock subscribed amounts to the sum of five hundred dollars per mile of the proposed road, copies of the articles of association shall be filed in the office of the recorder of each county through which the road is to pass, and shall from that time be a corporation, known by the name assumed in [its] articles of association." 1 R. S. 1876, p. 654, section 1.

"*Be it enacted*," etc., "That it shall be lawful for any number of persons, not less than three, to form themselves into a company under the act authorizing the construction of plank, macadamized, and gravel roads, for the purpose as well of purchasing and using a part or section of a road already built, or in process of building, as of constructing a new road." 1 R. S. 1876, p. 663, section 1.

The first and second paragraphs of the answer present substantially the same questions. With their exhibits they show that the appellees, on the 16th of November, 1878, subscribed, and on the 6th of December, 1878, filed in the office of the recorder of Montgomery county, articles of association, wherein the subscribers agreed and professed to organize themselves into a joint stock company, under the name of The Crawfordsville and Eastern Turnpike Company, "for

the purpose of purchasing, using, maintaining, operating and extending certain turnpikes or gravel roads, in Montgomery county, State of Indiana, as follows," etc.

Certain "lines of road" and certain "turnpikes" are then mentioned as being those built, owned and operated by certain turnpike companies named, one being The Crawfordsville and Shannondale Consolidated Turnpike Company, said to have been formed by the consolidation, in 1866, of The Crawfordsville and Shannondale Turnpike Company and The Crawfordsville and Darlington Turnpike Company; another being The Crawfordsville and Shannondale Turnpike Company; another The Crawfordsville and Fredericksburg Turnpike Company, and another The Crawfordsville and Darlington Turnpike Company. These lines or turnpikes, and the places to and from which they extend, are described in the articles of association with some indefiniteness, reference being made, for a more minute and particular description, to a map attached and made part of the articles. The amount of capital stock is stated and the number of shares into which it is divided.

Following the body of the articles of association are a number of columns, with proper headings, for the names of subscribers, their places of residence, and the amount of stock taken by each. The amount of capital stock stated in the body of the articles is taken by eight subscribers, being more than five hundred dollars per mile of the roads as described in the articles, with the aid of the map attached.

Under the heading for the names of subscribers, there are four names, of which the Christian names are indicated by initial letters only. For one subscription there are two names connected, thus: "Irvin & Scott." The three other subscribers sign their full names.

It is claimed in both the first and second paragraphs of answer, that the appellees are incorporated as The Crawfordsville and Eastern Turnpike Company, under said articles of association. The first paragraph does not deny that the ap-

pellees are acting as a corporation within this State. The second alleges that The Crawfordsville and Shannondale Turnpike Company, The Crawfordsville and Fredericksburg Turnpike Company, and The Crawfordsville and Darlington Turnpike Company, were each incorporated, showing the manner of the organization of each, and setting out its articles of association; that the first and the last of said three companies, for their mutual benefit and convenience, operated their roads together, under the name of The Crawfordsville and Shannondale Consolidated Turnpike Company; that said companies, respectively, from the dates of their organization, had exercised all the rights, privileges and franchises pertaining and belonging to such corporations; that at a regular meeting of the officers and members of each of said companies, two-thirds of the directors and a majority in value of such stockholders being present in person or by proxy, said companies sold and transferred to said Crawfordsville and Eastern Turnpike Company, their respective roads, with all the rights, privileges and franchises thereunto belonging, and that said last named company thereupon took possession, control and management of the same.

Whether the appellees intended, in good faith, to carry out the expressed purpose of their organization or otherwise, can not be enquired into in this proceeding, though the information seems to be in part directed to such enquiry. *The State, ex rel.*, v. *Kingan*, 51 Ind. 142.

The question for investigation is, whether the appellees are legally incorporated or not, and it is claimed, in their behalf, that they are so incorporated, under the act of May 12th, 1852, as amended, and the act of February 28th, 1855, the first section of each of which is above set out.

It is contended by counsel for the appellant, that, in subscribing the names of stockholders to the articles of association, it was necessary to subscribe their full names, writing their Christian names as well as their surnames.

It is also contended that the appellees have not complied

with the statute, in that their articles of association show the organization to be formed for the purposes alone of "purchasing, owning, maintaining, operating and extending" the roads of a number of distinct turnpike companies.

The statute makes the formation of the corporation dependent upon "complying with the following requirements," etc.

In *Rhodes* v. *Piper*, 40 Ind. 369, the court were clearly of the opinion that it was not only necessary, under this statute, that a corporate name should be assumed, but also that it should be set out in the articles.

In *The State, ex rel.*, v. *The Shelbyville, etc., Turnpike Co.*, 41 Ind. 151, it was held that the statute contemplates a statement of the amount of the capital stock in the body of the articles, in addition to the statement subscribed to the articles of the amount of stock taken by each subscriber.

The requirements of the statute are not merely directory; they are imperative, and one is as imperative and essential as another. They must all be substantially complied with. *Busenback* v. *The Attica, etc., Gravel Road Co.*, 43 Ind. 265. In the case last cited, it was held that the statutory requirement as to "the names and places of residence of the subscribers" is a condition precedent to the legal organization of the corporation, and that it was necessary to thus set forth the place of residence of every subscriber.

Every person is presumed to have a Christian name. *Zellers* v. *The State*, 7 Ind. 659. Initial letters used to indicate Christian names have not, with us, a constant signification, as the initial letter of the prænomen had with the Romans.

In *Vawter* v. *Gilliland*, 55 Ind. 278, it was held that a statute providing for the location of a highway upon a petition to the board of commissioners of the county, setting forth the names of the owners and occupants or agents of the lands through which it might pass, was not complied with where the petition gave the initials only of the Christian names of individual owners of land, and the firm names only of owners in partnership.

It is a well settled principle that where a corporation must be formed under a general statute requiring certain acts to be done before it can be considered in being, its existence, if properly called in question, must be proved by showing compliance with the requirements of the statute. But it is sufficient if a substantial compliance be shown.

There is a wide distinction between a requirement to sign or subscribe one's own name, and a requirement to set forth the name of another person, or to set forth one's own name, not by way of signing or subscribing, to indicate consent or approval. The statute now in question requires, not that the names be set forth in the body of the articles, but that "the names and places of residence of the subscribers and the amount of stock taken by each shall be *subscribed* to said articles of association."

Under a statute requiring the voting paper in an election of councillor of a borough to be "signed with the name of the burgess voting," it was held by the Court of Queen's Bench that papers signed with the initials for Christian names were not thereby made insufficient. *Regina* v. *Avery*, 18 Q. B. 576. One may effectually bind himself by signing his initials to an instrument. *Palmer* v. *Stephens*, 1 Den. 471.

In *Miller* v. *The Wildcat, etc., Co.*, 52 Ind. 51, 59, upon an objection that the articles of association of a corporation formed under the amended statute of 1852, here in question, did not show the residence of the subscribers, it was held that the use of the double comma following the name of a subscriber and under the name of a certain county and the name of the State, designated by a heading as a place of residence, sufficiently indicated the place of residence, for the reason that such use of the double comma is sanctioned by common usage and literary authority. And while of various objections made to the articles, none had reference to the names of subscribers, an extract from the articles set out in the report of the case shows that one of the two subscribers whose names are given in the extract, used initial letters alone to indicate

his Christian name; and, without any question having been made on this ground, the articles were held sufficient.

The indication of Christian names by initials in signing or subscribing names is a common usage.

We think the subscribing of the name required by the statute was intended by the Legislature to be in the subscriber's usual way of signing his name, and that the signatures made by the subscribers in this instance should be presumed to be made in such usual way.

It is not claimed that there had been any legal consolidation of any of the turnpike companies mentioned in the articles of association of The Crawfordsville and Eastern Turnpike Company, though two of the old companies, it is said, were operating their roads together, for material benefit and convenience, under a name indicating a consolidation.

The appellees attempted to organize "for the purposes of purchasing, owning, maintaining, operating and extending" the roads of three distinct turnpike companies. All of the roads run in an easterly direction from Crawfordsville, one of them having a branch running in a northerly direction. As shown by the articles of association, two of them connect with each other at their western *termini*, while the third does not connect with or intersect either of the others at any point. Referring to the statute above quoted, we think that it would be a construction not supported by the words used or the reasonably inferred intent of the Legislature, to say that they permit the organization of a corporation for the purpose expressed in these articles of association.

By the first section of the act of February 28th, 1855, *supra*, it appears that the Legislature did not regard as already existing the power to form a corporation for the purpose of "purchasing and using a part or section of a road already built, or in process of building;" and by that enactment it conferred such power, but not a more extended one.

We are unable to find any statute which we think gives the authority claimed by the appellees. *Garrigus* v. *The*

Board of Comm'rs, etc., 39 Ind. 66; *Green* v. *Beeson*, 31 Ind. 7; *Stoddard* v. *Johnson*, 75 Ind. 20; *Gray* v. *Mount*, 45 Iowa, 591; *Johnson* v. *The Hudson River R. R. Co.*, 49 N. Y. 455; *Shue* v. *Highway Commissioner*, 41 Mich. 638; *People* v. *Troy House Co.*, 44 Barb. 625; *The New York, etc., Co.* v. *Fulton Bank*, 7 Wend. 412; *Arnold* v. *The City of Cambridge*, 106 Mass. 352; *Frye* v. *Chicago, etc., R. R. Co.*, 73 Ill. 399.

It being shown by the first and second paragraphs of the answer, that the appellees are organized for an unauthorized purpose, those paragraphs were insufficient.

The fourth paragraph of the answer alleged, in substance, that, in 1879, the State commenced and waged, in the Montgomery Circuit Court, with what result is not stated, a prosecution by information, against one Harrison Flannagan, upon a charge of breaking down a certain toll-gate, alleged in said information to be the property of The Crawfordsville and Eastern Turnpike Company, and that the State recognized the appellees as a corporation.

The fifth paragraph alleges a prosecution before a justice of the peace against another person, on a charge of maliciously injuring a toll-house, the property of said company, to which the defendant pleaded guilty; and that he was fined. And it is claimed that, therefore, the State is estopped to deny the existence of the corporation.

The appellees have not attempted to offer any authority or any reason in favor of these paragraphs or either of them, and it does not seem necessary to offer any against them. There was no error in sustaining the demurrer to each of these paragraphs.

No other questions need be noticed, as we think the judgment should be reversed for error in overruling the demurrer to the first and second paragraphs of the answer.

PER CURIAM.—It is therefore ordered by the court, upon the foregoing opinion, that the judgment of the court below be and the same is in all things reversed, at the costs of the appellees, and the cause remanded, with instructions to sustain the demurrer to the first and second paragraphs of the answer.

No. 10,381.

Losey et ux. *v.* Bond, Trustee, et al.

Supreme Court.— *Appeal.— Parties.— Trust and Trustee.— Mortgage.*—E., trustee of an express trust created by mortgage, obtained a judgment of foreclosure, and then died. Afterwards the mortgagors appealed, making a party appellee B., who was named in the mortgage as the successor of E. as trustee in case of the death of the latter.

Held, that B. was properly made a party to the appeal.

From the Marion Superior Court.

J. Hanna, F. Kneffler and *J. S. Berryhill*, for appellants.

T. A. Hendricks, C. Baker, O. B. Hord and *A. W. Hendricks*, for appellees.

Worden, C. J.—Robert C. Losey and Emma J., his wife, executed a deed of trust, in the nature of a mortgage, to one Jonathan Edwards, as trustee, to secure the payment to the Equitable Trust Company of a sum of money therein mentioned.

Edwards, as such trustee, obtained a decree of foreclosure of the mortgage in the court below. After the judgment of foreclosure was obtained Edwards died. Losey and others have appealed to this court from the judgment of foreclosure, and have made Henry R. Bond an appellee, as trustee succeeding Edwards, deceased.

Bond now moves that the appeal be dismissed as to him, on the ground that he is not a proper party to the appeal.

It is provided, in the mortgage or deed of trust, "that in case of the death, absence from the United States, inability or refusal to act of the party of the second part" (Edwards), "at any time when his action, under the foregoing powers and trusts may be required, then Henry R. Bond, of," etc., "shall be, and hereby is, appointed and made the successor to said party of the second part in said trusts, with like powers and authority; and the title to the said premises shall thereupon become vested in such successor in trust for the purposes aforesaid."

This provision for the succession in the trust in case of the death, etc., of Edwards, was, doubtless, valid. It is said in 1 Perry on Trusts, 3d ed., section 287, that "The person who creates the trust may mold it into whatever form he pleases: he may therefore determine in what manner, in what event, and upon what condition the original trustees may retire and new trustees may be substituted. All this is fully within his power; and he can make any legal provisions which he may think proper for the continuation and succession of trustees during the continuance of the trust." Again, at section 288, the same author observes that "Every well-drawn instrument, creating trusts intended to continue for any considerable time, should contain authority and power for any of the trustees to relinquish the trust, as well as provisions for filling vacancies occasioned by resignation, death, or incapacity. Such provisions save the cost and trouble of constant applications to courts."

The action of the trustee is required so long as anything remains to be done, in order to finally close the business of the trust. That business is not closed as long as this appeal is here pending, though the land may have been sold under the judgment rendered below.

If the judgment should, for any reason, be reversed, the cause will go back to the court below for further proceedings, in which the action of the succeeding trustee will be required.

Besides, the succeeding trustee is a proper party to resist the reversal sought by the appellants; and if the judgment should be affirmed, and if the property was bought in at sheriff's sale on the judgment by Edwards, as such trustee, in his lifetime, the title would, doubtless, vest in Bond, as his successor.

Bond, as the successor of Edwards, is a proper appellee, and the motion must be overruled.

81 512
196 44
81 512
386 647

No. 9011.

BERTELSON v. BOWER.

CONTRACT.—*Pleading.—Condition Precedent.—Performance.*—In pleading the performance of a contract, the statute (R. S. 1881, section 370) makes it sufficient to aver that the party has performed all the conditions on his part.

SAME.—*Sale of Personal Property.—Title.*—A contract, whereby A. agrees to buy all the spring lambs of B. at certain prices to be paid, the seller to pasture them till called for, passes title to the purchaser without specifically setting the property apart, and if, without fault of the seller, it suffers injury, the loss falls upon the purchaser.

SPECIAL FINDING.—*Practice.*—When the court finds the facts specially, stating separately its conclusions of law thereon, a party by excepting to the conclusions does not lose the right to move for a new trial.

From the Vanderburgh Superior Court.

J. E. Williamson, for appellant.

C. Staser, C. Buchanan, H. C. Gooding and *J. S. Buchanan*, for appellee.

ELLIOTT, C. J.—Appellant argues at much length that the complaint is insufficient, because it does not show performance by appellee of his part of the contract upon which the action is founded. The complaint substantially adopts the language of the statute and alleges that the plaintiff performed all the conditions of the contract on his part. R. S. 1881, section 370. The code expressly declares that such an allegation shall be sufficient. *Lowry* v. *Megee*, 52 Ind. 107.

The court made a special finding at the request of the appellant. The material facts stated in the finding are these: In March, 1879, a verbal contract was entered into between the parties, wherein the appellant agreed to buy of appellee his spring lambs, one hundred and twenty in number, the price of the first fifty delivered to be $2.25 each, the price of the second fifty to be $2 each, and that of the remainder to be $1.50 each; the contract further provided that the appellee should keep the lambs on good pasture until called for by appellant; that the latter should take each week such a num-

ber as he needed, but all to be taken by him before the 1st day of September, 1879. It was also provided that the appellee was not absolutely bound to deliver the last lot of twenty, but if he so elected the appellant was bound to take them. The lambs bought by appellant were not specifically set apart or designated, but it was the agreement that they should all remain with the appellee's flock of sheep until called for from time to time by appellant. Appellant inspected the places where the lambs were to be kept, and also examined the lambs purchased. Pursuant to the contract the appellant during the months of May and June went to appellee's farm, received and took away twenty-three of the lambs, and paid to appellee fifty dollars. Appellant refused to accept any other lambs. Appellee fully performed his part of the contract, but the lambs, from some unknown cause not attributable to any fault or wrong of the appellee, became unfit for the market, and for the purpose for which they were purchased.

Appellant's counsel says that the case presents this question: "If personal property the subject of an executory contract of sale, in the absence of warranty, sustains damage without the fault of either party to the contract, before the title passes, by whom shall the loss be borne, bargainor or bargainee?" This question is, as counsel affirms, easily answered. Nobody doubts that where no title has passed the seller, and not the buyer, must bear the loss.

The rule expressed in the answer to the question is, however, far from disposing of the case. The material question is, did the title pass? Where any act remains to be done before the sale is complete the title remains in the seller and he must sustain the loss caused by injury to the property. In the present case no act remained to be done. All that was necessary to complete the sale was done.

The case is entirely unlike the sale of certain articles out of a large number. Here the sale was of all the spring lambs owned by the appellee. There was no setting apart to

be done. There was no act of separation to be performed. There was no necessity for any counting or weighing, or for any similar acts.

The fact that the appellee was to retain possession of and pasture the lambs, did not change the character of the transaction. It was none the less a sale because the seller agreed to care for the property. It was just as competent for the parties to agree that the seller should hold possession as bailee, as for them to agree that anybody else might do so. This rule is well supported. *Henline* v. *Hall*, 4 Ind. 189; *Cloud* v. *Moorman*, 18 Ind. 40; *Scott* v. *King*, 12 Ind. 203; *Marble* v. *Moore*, 102 Mass. 443; Benj. Sales (3 Am. ed.), sections 315, 316, 317, authorities *n*. In *Lester* v. *East*, 49 Ind. 388, it was said: "There is no doubt that a sale of personal property may be complete, so as to pass the title without a delivery." *Ramsey* v. *Kochenour*, 8 Blackf. 325; *Bradley* v. *Michael*, 1 Ind. 551; *Wright* v. *Maxwell*, 9 Ind. 192; *Sherry* v. *Picken*, 10 Ind. 375; *Davis* v. *Murphy*, 14 Ind. 158.

Appellant's counsel asks us to examine the evidence. The appellee controverts our right to do this, and insists that the appellant is precluded by his exceptions to the conclusions of law. We are referred by appellee to the cases of *Dehority* v. *Nelson*, 56 Ind. 414; *Hartman* v. *Aveline*, 63 Ind. 344; *Wharton* v. *Wilson*, 60 Ind. 591. From the case first cited this quotation is made: "By excepting to the conclusions of law of the court, drawn from its findings of the facts, the party excepting admits such facts to have been fully and correctly found."

Counsel have given these cases an erroneous construction. They do not decide that a party who excepts to conclusions of law precludes himself from moving for a new trial. They simply decide that the exception admits, for the purposes of the exception, the truth of the propositions of fact stated by the court. An exception to the conclusions of law does not cut off a motion for a new trial. If a party desires to bring in review the finding of the court upon questions of fact, a

motion for a new trial, upon the ground that it is not supported by or is contrary to the evidence, is the appropriate proceeding. *Robinson* v. *Snyder*, 74 Ind. 110.

We have examined the evidence, and we think it fairly sustains the finding.

Judgment affirmed.

Opinion filed at November term, 1881.

Petition for a rehearing overruled at May term, 1882.

No. 8864.

JOHNSON SCHOOL TOWNSHIP *v.* CITIZENS BANK OF GREENFIELD.

PROMISSORY NOTE.—*What is.—Form.—School Township.—Township Trustee.—Descriptio Personæ.*—An instrument may be a promissory note though it contains no direct "promise to pay," if it have equivalent words; for instance, a writing of the following tenor: This is to certify that there is due from Johnson Township, to A. and B., or order, one hundred dollars for school furniture, payable on, etc., with interest, etc., for value received, etc; payable at the First National Bank, etc.; signed W. H. F., "Trustee Johnson Township," is the promissory note of Johnson School Township.

SAME.—*Pleading.—Copies.*—A complaint of two paragraphs, upon two promissory notes of identical tenor, must be accompanied with a copy of each note, filed with its proper paragraph. It is not enough to put in place of a copy of either note a statement of its identity with the other exhibit.

SAME.—*Power of Township Trustee to Execute Note.*—A township trustee has authority to buy school furniture for the school township, and to give the promissory note of the corporation therefor; and payment can not be resisted on the ground that the goods were not needed, and the price too high, unless fraud is shown, nor then without an offer duly made to return the goods.

PRACTICE.—*Pleading.—Partial Defence.*—A partial defence pleaded as an entire defence is insufficient on demurrer.

SAME.—*Demurrer.—Defect of Parties.*—A demurrer for want of facts, and for want of the plaintiff's capacity to sue, presents no question as to a defect of parties.

From the Clinton Circuit Court.

J. N. Sims, for appellant.

S. H. Doyal and *P. M. Gard*, for appellee.

WOODS, J.—Complaint in three paragraphs by the appellee against the appellant, each paragraph purporting to be founded on a writing executed by the appellant to the assignors of the appellee, described respectively as exhibits A, B and C. Exhibit A, referred to in the first paragraph, is of the tenor following, to wit:

"A"

"$514.50.

"State of Indiana, County of Clinton,

"Treasurer's Office, Johnson Township, August 14th, 1876.

"This is to certify, that there is due from this township to Teal & Puterbaugh, or order, five hundred and fourteen dollars and fifty cents, for school furniture, and payable on or before the 1st day of January, 1878, with interest at the rate of ten per cent. per annum from Sept. 20th, 1876, and if not paid at maturity, both principal and interest shall bear ten per cent. until paid. For value received, waiving valuation and appraisement laws. Payable at the First National Bank of Frankfort, Ind. (Signed) W. H. FRIER,

"Trustee Johnson Township."

Instead of giving a copy of the instrument referred to in the second paragraph, the pleader inserted after exhibit "A" the following statement, to wit:

"B"

"This second note is an exact copy of exhibit 'A,' as set out above, except the endorsements, which are as follows: 'Teal & Puterbaugh; Boyd & Hinchman.'"

Exhibit "C," referred to in the third paragraph, is given in full, and does not differ essentially from exhibit "A."

The appellant demurred to each paragraph, for want of capacity in the plaintiff to sue, and for want of facts sufficient to constitute a cause of action, and has assigned error upon the overruling of the demurrer.

Counsel for the appellant insists that the writings sued on

are not promissory notes, and not transferrible, so as to vest the cause of action in the assignee. While there is no direct or explicit *promise* to pay in the instruments sued on, they nevertheless contain equivalent words, and it being expressly shown on their face that the consideration was school furniture, we are of opinion that they should be regarded as the promissory notes of the school township. If not strictly within the definition of a promissory note, they nevertheless evidence the contract and obligation of the school township, which "acknowledges money to be due," and are, by statute, "negotiable by endorsement thereon, so as to vest the property thereof in each endorsee successively." 1 R. S. 1876, p. 635, sec. 1.

There can, therefore, be no question of the plaintiff's capacity to sue, and the demurrer, for want of such capacity, does not present the question whether the endorsers should have been made defendants to answer to their interests. *Cox* v. *Bird*, 65 Ind. 277; *Dale* v. *Thomas*, 67 Ind. 570.

The objection made to the second paragraph, that a copy of the instrument sued on is not filed with the pleading, must be sustained.

Two paragraphs or more of a complaint may be based on the same writing, and, in such instance, a single copy referred to in each paragraph, will be sufficient. *Peck* v. *Hensley*, 21 Ind. 344; *Maxwell* v. *Brooks*, 54 Ind. 98. But such is not the case here. The reference is to another writing, and, because identical in terms with that already set out in connection with the first paragraph of the complaint, the pleader, in order to avoid the labor of copying, saw fit to disregard the express command of the code, sec. 78, which says that "When any pleading is founded on a written instrument, * * the original, or a copy thereof, must be filed with the pleading." It has been repeatedly held that a pleading is demurrable, if this rule is not complied with, and that, on failure to demur, the defect is not cured by the verdict, but may be reached by motion in arrest of judgment.

No precedent is cited for the departure which we are now asked to justify, and we are not disposed to make the precedent now. If such an excuse for giving a copy of an entire instrument be permitted, it may as well prevail for partial omissions, where it may be alleged that the omitted parts are identical with corresponding parts of an exhibit already given; and once it is begun to enquire what are material and what immaterial departures from the rule, a confused and doubtful practice will be the inevitable result.

It may be remarked that the statement, "This second note is an exact copy," etc., made, as it is, outside of the complaint, and not over the name of the party or his attorney, is ineffectual and meaningless. An averment, to be of significance, must be found in the pleading, and not in the place where only an exhibit can have force, and that simply because the code authorizes and requires it.

If the position be taken that exhibits A and B are one and the same instrument, and the reference thereto sufficient on demurrer, then a new trial must be granted on the ground of excessive damages. If one instrument only was referred to in the two paragraphs, the proof of that one only was relevant, and the damages should have been assessed accordingly; whereas three certificates were put in evidence and judgment given for the amount found due upon them all.

The appellant filed, besides the general denial, twelve special paragraphs of answer, addressed separately some to one and some to another of the respective paragraphs of the complaint. The court sustained a demurrer to each of these answers and the rulings are assigned as error.

The second, fifth, ninth, eleventh, twelfth and thirteenth paragraphs are to the effect that the defendant had no need for the furniture for which the contracts sued on were made, and, as is averred in some of the paragraphs, the contracts were made with the fraudulent purpose, on the part of the trustee and the payees, to cheat and defraud the township. The facts stated are clearly insufficient. The township trus-

tee was, under the law, the judge whether the furniture was needed, and was authorized to bind the township by such contracts. *Sheffield School Township* v. *Andreas*, 56 Ind. 157. If the purchases were unnecessary and the contracts fraudulent, yet the township could not escape liability without showing a rescission of the contracts by a return or offer to return the goods.

The third, sixth and tenth answers are to the effect that the price agreed to be paid for the furniture was as much as three hundred dollars in excess of the market value, and that the contracts were made for the purpose of defrauding the defendant. These pleas are clearly bad, if for no other reason, because they profess to answer the entire paragraph of complaint to which they are respectively addressed, while in fact they respond to only a part of the amount claimed.

It is not quite true, as counsel claims, that fraud vitiates entirely whatever it taints. It entitles the defrauded party to annul or rescind the tainted contract, but he can not do this, and at the same time retain benefits received under it. These paragraphs, like the first named, fail to aver any return or offer to return the goods received by the defendant under the alleged fraudulent contracts.

The fourth, seventh and eighth paragraphs purport to be partial answers only, but, without charging bad faith or fraudulent intent, aver only that the price agreed to be paid for the goods was in excess of the value thereof, by the sum of three hundred dollars; wherefore it is claimed that the notes sued on were to that extent without consideration. It is a manifest misnomer to set up an inadequacy of consideration as a partial want of consideration. It was within the power of the trustee to make the contract, including the adjustment of the price, and in the absence of fraud the corporation is bound by his contract in that as well as in other respects.

The judgment is reversed with costs, and with instructions to sustain the demurrer to the second paragraph of the complaint.

No. 10,306.

Dubois *v.* Johnson.

Superior Courts.—*Appeals from General Term.—Judgments of Reversal.*—Under the provisions of section 1362, R. S. 1881, appeals will lie to the Supreme Court from judgments of superior courts in general term, reversing or modifying judgments at special term, by any party who has had judgment in his favor at special term.

From the Marion Superior Court.

W. W. Herod and *F. Winter*, for appellant.

G. K. Perrin, R. N. Lamb and *S. M. Shepard*, for appellee.

Howk, J.—This was a suit by the appellee against the appellant, to obtain a modification of a decree of divorce, rendered by the court below on the 6th day of October, 1880, in favor of appellee and against appellant, in so far as such decree awarded the care and custody of Orra Ann Johnson, the minor child of the parties, to the appellant. To the appellee's petition for such modification of the decree, the appellant answered by a general denial. She also filed a cross petition, wherein she asked for a modification of the decree of divorce, in so far as it awarded the care and custody of William Artemas Johnson, the minor son of the parties, to the appellee. The matters arising under the petition and cross petition were submitted to the court for trial and hearing, and a finding was made against the appellee upon his petition, refusing to modify the decree of divorce as prayed for therein, and against the appellant upon her cross petition, refusing the modification of the decree as demanded by her therein. Judgment was rendered by the court, at special term, in accordance with its findings, and that the appellant recover of the appellee the costs of suit.

From this judgment the appellee appealed to the court below in general term, where the judgment of the court, at special term, was in all things reversed, and the cause was remanded to the special term, with instructions to grant a new trial, and

for further proceedings. From this judgment of reversal, the appellant prayed an appeal to the Supreme Court, which was granted, and, on the 23d day of June, 1882, she filed in the office of the clerk of this court a certified transcript of the record of this cause, with her assignment of error endorsed therein.

The appellee has filed in this court his motion in writing to dismiss the appeal in this case, for the following reasons, to wit:

"The judgment of the superior court, in general term, reversing the judgment of said court at special term, and granting a new trial in said cause, was not a final judgment, from which an appeal can be prosecuted to the Supreme Court of the State, and the Supreme Court has no jurisdiction to hear and determine this appeal. Wherefore appellee prays that this appeal may be dismissed, and the cause remanded to the Marion Superior Court, with an order to re-docket the cause for trial in the special term of the court, and for all proper relief."

We are of the opinion that this motion is not well taken, and must be overruled. In section 1362, R. S. 1881, it is provided as follows: "Any party may appeal to the Supreme Court from the order or judgment of general term, in any case where, by existing or future laws of this State, an appeal may be had from an order or judgment of the circuit court; and also when a party has had a judgment in his favor in a special term, and it is reversed or modified by the general term, upon appeal to it. The appeal from the general term to the Supreme Court shall be regulated by the law regulating appeals from the circuit court to the Supreme Court, so far as applicable. An appeal may also be taken to the Supreme Court in the same manner and in like cases as from circuit courts, or the judge thereof, when, on account of the incompetency of some of the judges, an appeal can not be taken to general term."

The first two sentences of this section, closing with the word

"applicable," are a literal copy of section 27 of the act of February 15th, 1871, "to establish superior courts, defining their jurisdiction," etc., in every particular, except as to punctuation. Throughout section 27 (2 R. S. 1876, p. 27), no punctuation marks are to be found, except the comma. It may well be supposed, that it was this faulty punctuation, which led Judge Buskirk, in his carefully prepared "Practice on Appeals" to this court, to give the following construction on the provisions of section 27: "When the judgment pronounced by the general term results in a new trial, the cause must be remanded to the special term for another trial; but when the judgment is final, and puts an end to the case, an appeal may be had to the Supreme Court." Busk. Prac., p. 135. This construction of the language used seems to us to be erroneous, in so far as it may be construed to mean that appeals will not lie to this court from judgments of the general term reversing or modifying the judgments rendered at special term. Certainly, as the language used is now punctuated, in section 1362, above quoted, it is not fairly susceptible, we think, of any such construction. It will be observed, that the first sentence of the section quoted, expressly provides for appeals to the Supreme Court, from the judgments of general term, in two classes of cases: *First.* Appeals from judgments of affirmance of the judgments at special term, or final judgments, by any party to the record; and, *Second.* Appeals from judgments of general term, reversing or modifying the judgments in special term, by any party who has had judgment in his favor in special term.

In the case at bar, the appeal of the appellant, who had in her favor the judgment in special term, which was in all things reversed by the general term, comes under the second of the two classes of cases, in which appeals will lie from the judgments of the general term to the Supreme Court, and is expressly authorized by the statute.

The point now decided does not seem to have been considered or passed upon by this court in any previous case; but,

in many cases, appeals from the judgments of general term, reversing judgments at special term, have been entertained, considered and decided by this court, but without consideration or decision of the question now decided. *Irwin* v. *Smith*, 72 Ind. 482; *Cleaveland* v. *Vajen*, 76 Ind. 146; *The Pittsburgh, etc., R. W. Co.* v. *Yundt*, 78 Ind. 373; *Richardson* v. *The Eagle Machine Works*, 78 Ind. 422.

It will be observed, that the last sentence of section 1362, *supra*, is a new provision, and is not found in section 27 of the act of February 15th, 1871, *supra*. It was apparently intended to provide, in the class of cases mentioned in that sentence, for a direct appeal from judgments in special term to the Supreme Court. The provision is not applicable to the case now before us, and is not considered.

The motion to dismiss this appeal is overruled, at the appellee's costs.

No. 8078.

The Grand Rapids and Indiana Railroad Company, Lessee, v. Jones.

Practice.—*Pleading.*—*Uncertainty.*—Mere uncertainty in a pleading is not reached by demurrer, but by motion to make specific.

Railroads.—*Fences.*—*Cattle-Pits.*—When a railroad company makes gates in its fences to enable a farmer, whose lands lie on both sides, to pass and repass, and does not protect the crossing by cattle-pits, the railroad is not securely fenced, as the statute (R. S. 1881, section 4031) requires.

Same.—*Stock Killed.*—*Negligence.*—*Evidence.*—There is no question of negligence by either party, nor of motive for not securely fencing, involved in a suit for animals killed, under the statute requiring railroads to be fenced, and it is not error to exclude evidence upon these subjects.

From the Delaware Circuit Court.

A. Zollars, for appellant.

M. B. Miller and *R. S. Gregory*, for appellee.

NIBLACK, J.—This was an action by Benjamin Jones against the Grand Rapids and Indiana Railroad Company, lessee of the Cincinnati, Richmond and Fort Wayne Railroad Company, for killing a horse, and was commenced in the Randolph Circuit Court, from which a change of venue was taken to the court below.

The complaint charged that, in Randolph county, at a point on the railroad operated by the defendant, at which the defendant was bound to erect and maintain a fence along the line of said railroad, but at which the defendant had failed and refused to erect and maintain a fence, and at which said railroad was not then and there securely fenced, the plaintiff's horse, worth $150, went upon the track of such railroad, and that thereupon the defendant ran its engine, locomotive, cars and other carriages against, upon and over said horse, thereby crushing and instantly killing him.

The defendant demurred to the complaint, but its demurrer was overruled. Issue; verdict for the plaintiff; motion for a new trial denied, and judgment on the verdict.

Error is assigned upon the decision of the court upon the demurrer to the complaint, and upon the overruling of the motion for a new trial. The demurrer to the complaint involved more a question of uncertainty in phraseology than of substantial insufficiency, and hence a question which ought to have been raised, if at all, by a motion to have the objectionable part of the complaint made more specific.

At the trial the evidence either established, or fairly tended to establish, the following facts:

That at the point in Randolph county at which the horse was killed, the railroad ran north and south through the lands and farm of one Culp, dividing the farm into two parts; that Culp resided on that part of his farm which was on the east side of the road, and that part of his farm lying west of the road consisted of a field which he cultivated; that a fence had been built along the line of that part of the railroad, to the sufficiency of which, except as to a gate, no

objection was urged; that a gate had been put into and made a part of the fence on the west side of the road at the point at which persons residing upon and cultivating the Culp farm were accustomed to cross and recross said road; that Culp was in the habit of passing and repassing quite frequently through that gate; that on the afternoon of the day before the horse was killed, Culp, in passing through the gate on his way to the west field, found the gate open, and on his return did not close it; that on the same afternoon, the proper section foreman, whose duty it was, amongst other things, to keep all gaps in the fence closed, passed the gate in walking over the road; that he saw Culp going through the gate with a sled, in the direction of the west field, and afterwards saw Culp in that field loading his sled with fodder; that the foreman passed on without closing the gate; that the plaintiff resided on a farm on the west side of the road and adjoining Culp's west field; that in the evening of the 15th day of January, 1878, the plaintiff turned the horse sued for, and another horse, into a field adjoining Culp's west field; that during the night following the horses, either through a gap in, or by jumping over, the partition fence, passed into Culp's field, west of the road, and thence through the gate which was still open, onto the railroad track; that next morning, about four o'clock, a train of cars, belonging to the defendant, while passing over the road in the vicinity of the gate, ran upon and killed the horse.

As to whether, for some time previously, the gate had not been frequently left standing open by some one, and as to the care exercised by persons in charge of the railroad, to keep it closed, were questions concerning which there was some conflict in the evidence.

The defendant, at the proper time, offered to prove in effect:

1. That its employees had used due diligence in trying to keep the gate closed.

2. That the plaintiff had been guilty of contributory negligence in turning his horses into the field adjoining Culp's

west field, on account of the insufficiency of the fence between the two fields.

3. That the gate was erected and put into the fence for the accommodation of one Stratton, who was, at the time it was put in, the owner of the Culp farm.

But the evidence tending to establish these several propositions was all excluded by the court.

There was no question of negligence, whether upon the part of the plaintiff or of the defendant, involved at the trial of this cause. Nor was the motive, which induced the railroad company to put the gate in question into its fence, material as against the plaintiff. The court did not, therefore, err in excluding the evidence proposed by the defendant as above.

The material, and in fact controlling, question in this case is, Did the evidence show that the defendant's line of road was securely fenced at the point at which the plaintiff's horse went upon its track?

The evidence failed to show that the railroad crossing at Culp's farm, to which the gate was merely an auxiliary, was properly protected by cattle-pits. That failure constituted a fatal defect in the defendant's evidence.

No railroad can be said to be securely fenced at an established crossing, where suitable cattle-pits have not been constructed. *New Albany, etc., R. R. Co.* v. *Pace*, 13 Ind. 411; *Indianapolis, etc., R. R. Co.* v. *Irish*, 26 Ind. 268; *Indianapolis, etc., R. R. Co.* v. *Kibby*, 28 Ind. 479; *Pittsburgh, etc., R. R. Co.* v. *Ehrhart*, 36 Ind. 118; *Indianapolis, etc., R. R. Co.* v. *Bonnell*, 42 Ind. 539; *Pittsburgh, etc., R. W. Co.* v. *Eby*, 55 Ind. 567.

There is no question in the record as to the liability of Culp, either to the plaintiff or to the railroad company. As to that, therefore, nothing can be decided, or properly intimated, in this opinion.

In our opinion, there was sufficient evidence to sustain the verdict.

The judgment is affirmed, with costs.

No. 8927.

Branstetter et al. *v.* Dorrough.

Slander.—*Actionable Words.—Pleading.—Inducement and Innuendo.*—Words spoken of an unmarried woman which are intended to convey, and do convey, to the mind of the hearer, the meaning that she was guilty of fornication, are slanderous and actionable; and when the allegations of the complaint, in an action for slander, show, by the inducement and innuendo, that the words charged to have been spoken meant, and were intended to mean, that the plaintiff had been guilty of fornication, such complaint shows that the words were uttered slanderously, and are actionable.

Same.—*Malice.—Presumption.—Instruction.*—Where, in an action for slander, justification is not pleaded, it is not error to instruct, that if the defendant spoke the words charged, intending and being understood to impute fornication as charged, the law will presume malice.

Same.—*Repeating Slanderous Charges.*—It is actionable to repeat in good faith slanderous words concerning another, on an occasion not privileged, though at the same time a disbelief in their truth be expressed, and the purpose of the repetition be to obtain advice as to the propriety of informing the plaintiff of the charges.

Instructions.—*Practice.—Harmless Error.*—If all the instructions, taken as a whole, fully give the law of the case, it is not material that a single one may, in itself, omit something which ought to be given.

From the Greene Circuit Court.

E. E. Rose and *E. Short*, for appellants.

L. Shaw, *J. S. Bays* and *W. M. Franklin*, for appellee.

Elliott, J.—The appellee alleges in her complaint that she is a person of good character; that she is unmarried; that appellants are husband and wife; that the appellant Sarah Branstetter did, in a conversation had in the presence of Lizzie Booze, Alice Carver and others, "of and concerning the appellee's character for chastity," and "of and concerning her being guilty of fornication," utter the following false and slanderous words: "Dave Collins or Dave Congleton and Ordie Dorrough (meaning plaintiff) were down in the woods at the cross-road church, and that Thomas Dorrough went down to them two or three times to get them to come to the house, but they would not come, and that Dave

Collins or Dave Congleton had her (meaning plaintiff) up against the graveyard fence, but could not accomplish anything there, but got over into the graveyard (meaning thereby that said Collins or Congleton and said plaintiff did not have sexual intercourse against the graveyard fence, but did have in the graveyard)." It is also alleged that "the said Sarah E. Branstetter said to Lizzie Booze, 'Did you hear the awful report on Ordie Dorrough (meaning plaintiff)? I will tell you if you will tell no one else. Dave Collins or Dave Congleton and Ordie (meaning plaintiff) met at the cross-road church, and that Dave got her (meaning plaintiff) up against the graveyard fence, but they (meaning plaintiff and said Collins or Congleton) could not accomplish anything there, and that they (meaning said Collins or Congleton and plaintiff) got over into the graveyard, and in so doing broke a board off the graveyard fence' (meaning that said Collins or Congleton and the plaintiff were not guilty of fornication against the graveyard fence, but were guilty in the graveyard)." It is averred that the words were used in a slanderous sense by Sarah E. Branstetter, that "she thereby meant, and was understood by those who heard her to mean, the act of having sexual intercourse, and meant to charge, and was so understood by those who heard her, that the plaintiff was guilty of fornication."

We need not determine whether the words are or are not slanderous *per se*, for the inducement and innuendo clearly show that they were uttered slanderously, and are actionable. There are cases lending much support to the appellee's contention that they are actionable *per se*. *Shields* v. *Cunningham*, 1 Blackf. 86; *Guard* v. *Risk*, 11 Ind. 156; *Proctor* v. *Owens*, 18 Ind. 21. But whether actionable *per se* or not, they are plainly so as shown by the inducement and innuendo, for they clearly meant, and were understood to mean, to charge that the appellee had been guilty of fornication.

In *Button* v. *Heyward*, 8 Mod. 24, FORTESCUE, J., said: "It was the rule of HOLT, Chief Justice, to make words

actionable whenever they sound to the disreputation of the person of whom they were spoken; and this was also Hale's and Twisden's rule; and I think it a very good rule." We think the words spoken by the appellant "sound to the disreputation" of the appellee, and entitle her to her action. Charges of unchaste conduct are seldom made in plain words; they are almost always made by indirection or insinuation, but, however made, the words are slanderous when they are intended to convey, and do convey, to the minds of the hearers the meaning that the unmarried woman of whom they are spoken was guilty of fornication. *Drummond* v. *Leslie*, 5 Blackf. 453; *O'Conner* v. *O'Conner*, 24 Ind. 218; *Harrison* v. *Findley*, 23 Ind. 265; *Keesling* v. *McCall*, 36 Ind. 321; *Hotchkiss* v. *Olmstead*, 37 Ind. 74; *Huddleson* v. *Swope*, 71 Ind. 430.

It is insisted that the second instruction given by the court is erroneous, for the reason that it does not inform the jury that the hearers understood the words used by Sarah E. Branstetter to import a charge of fornication. Other instructions do clearly and correctly advise the jury upon this point, and the instructions, taken together, gave the law to the jury, as the appellants claim it to be. Instructions are not to be considered as so many complete and distinct wholes, each complete in itself; but they are all to be taken together as constituting one entire whole.

The fourth instruction directed the jury that, if Sarah E. Branstetter meant, and was understood, to charge the appellee with fornication, the law would presume malice. We think there was no error in giving this instruction. There was no plea of justification, and the truth of the charge was not in issue. Townshend Slander and Libel, section 73; Odgers Libel and Slander, 169. Malice does not, as appellants maintain, mean intent. The intent of one who utters defamatory words is not determinative of the question of malice. A recent writer says: "The intention or motive

with which the words were employed is as a rule immaterial. If the defendant has in fact injured the plaintiff's reputation, he is liable, although he did not intend so to do, and had no such purpose in his mind when he spoke or wrote the words." Odgers Libel and Slander, 5. The intention may be shown in aggravation or mitigation, but not in bar.

Intention is material where the words are spoken upon a privileged occasion. In such cases, in order to create a liability, express malice must be proved, and intention or motive becomes an important consideration, but ordinarily the motive is not important in determining whether there is or is not a cause of action.

Malice is not synonymous with evil intent. Malice, as used in the law of slander, means the "absence of legal excuse." The text-writers agree in ascribing this meaning to the word. Odgers Libel and Slander, 265; Townshend Slander and Libel, sec. 90; Cooley Torts, 209; 1 Hilliard Torts, 325.

Where words are used which charge a woman of chaste character with fornication malice is implied. Proof of express malice is not required. It may, as Judge Cooley observes, be important to prove the absence of express malice to protect one against exemplary damages, but it can not bar the action. Cooley Torts, 209. This is the doctrine of our own cases. *Mousler* v. *Harding*, 33 Ind. 176; *Indianapolis Sun Co.* v. *Horrell*, 53 Ind. 528; *Cook* v. *Howe*, 77 Ind. 442.

A series of instructions were asked by the appellants, asserting that where one in good faith repeats slanderous charges against another, and at the same time expresses an unbelief in their truth, no action can be maintained. The court did right in refusing these instructions. It is actionable slander to repeat charges which defame the reputation. No one has a right to injure a woman of chaste character, by repeating words which charge her with fornication. In *Kelley* v. *Dillon*, 5 Ind. 426, it was said: "Let it be understood that a bare rumor or report is sufficient to justify the retailing of slander, and character would be at the mercy of the artful and designing, as

such defences could be easily manufactured beforehand to suit any emergency." A writer, to whom reference has already been made, says: "Every repetition of a slander is a wilful publication of it, rendering the speaker liable to an action. 'Tale bearers are as bad as tale makers.'" Odgers Libel and Slander, 169. *Clarkson* v. *McCarty*, 5 Blackf. 574; *Cates* v. *Kellogg*, 9 Ind. 506.

We are not called upon to consider whether the fact that the person speaking the slanderous words had heard them from another would mitigate the damages, for the instructions refused asserted that it would bar the action, and in doing this declared an erroneous rule, and were properly refused.

The occasion upon which the words were spoken was not a privileged one. The speaker retailed a slanderous charge to two of her neighbors, and she can not shield herself upon the ground that she did it for the purpose of obtaining their opinion as to whether she should or should not inform the appellee of the charges against her. The case is not within any of the classes of privileged occasions. Townshend Slander and Libel, section 209; 1 Hilliard Torts, 335; Cooley Torts, 210-217; Odgers Libel and Slander, 196-263. Where there is no confidential relation, no existing duty, and no common interest, a private person has no right to repeat a slanderous charge, although it may be declared to be for the purpose of obtaining advice. If one takes upon himself the office of an intermeddler, where he owes no duty, and has no common interest, he is a slanderer if he repeats a defamatory charge. The injury to the reputation of the slandered person is not repaired by the fact that the words were uttered for the purpose of taking counsel. Good names are not to be thus defamed by strangers and intermeddlers.

As there is evidence supporting the verdict, we can not disturb it.

Judgment affirmed.

No. 3824.

Evans et al. v. Feeny et al.

Vendor and Purchaser.—*Vendor's Lien.—Complaint.—Deed.*—In a complaint to recover purchase-money of real estate and to establish a vendor's lien, an averment that the purchaser has no other property subject to execution is unnecessary, and if the vendor has not conveyed to the purchaser, the absence of an averment that a deed has been tendered is an objection which can be made only by the purchaser.

Same.—*Lien.—Judgment.—Sheriff's Sale.*—A judgment against a purchaser of real estate having no conveyance, and there being no fraud, is not a lien upon the real estate, and a sale on execution issued on such judgment vests no rights in the purchaser.

Judgment.—*Practice.—Supreme Court.*—Objection to the form of a judgment can not be made, for the first time, in the Supreme Court.

From the Marion Circuit Court.

C. C. Nave, J. V. Hadley and *C. A. Nave*, for appellants.

J. B. Julian and *J. F. Julian*, for appellees.

Franklin, C.—Appellee William Feeny sued Wade H. Evans and wife, Peter Feeny and wife and Polly A. Brown. The pleadings are too voluminous to copy, but are substantially as follows: The complaint avers that, on the 15th day of September, 1873, the plaintiff purchased of said Evans certain lands, and received from him a title-bond for a deed for the same; that on the 5th day of August, 1875, he sold by parol said lands to said Peter Feeny, and received his three several promissory notes in part payment therefor, which notes are sued upon; that he then placed said Peter in the possession of said lands, who has continued to occupy and improve the same; that on the 30th day of May, 1878, said Evans and wife conveyed by warranty deed said lands to the plaintiff; that said Evans and Brown afterwards purchased said lands at a sheriff's sale, as the property of said Peter Feeny. The complaint then contains a prayer for judgment upon the notes, and that it be declared a lien upon the lands for its payment.

After the commencement of the suit, Peter Feeny conveyed by quitclaim deed all his interest in the lands to Charles

Heshion, who, upon petition, was admitted as a defendant in the case, and filed a cross complaint, setting up his claim to the lands. Evans and Brown also filed a cross complaint setting up their interest and claim to the lands. There were also denials filed by the various parties; after demurrers were overruled to the complaint and cross complaints, the case was finally put at issue, and submitted to the court for trial. At the request of the parties the court made a special finding, and stated its conclusions of law in favor of appellee and Heshion.

Appellants Evans and Brown moved for a new trial, which was overruled. They then moved in arrest of judgment, which was also overruled. Proper exceptions were reserved to all the foregoing rulings, and the conclusions of law. Appellants Evans and Brown appealed the case to this court, have assigned errors and served the proper notice upon the other parties. Heshion has appeared in this court and filed a brief, asking that the judgment below be affirmed as to him. There has been no appearance or brief filed on the part of appellee. We will, therefore, consider the questions in the order of appellants' brief.

The objection to the complaint presented under the demurrer is, that it contained no averment that Peter Feeny had no other property subject to execution; and, in support of this objection, we are referred to the case *McCauley* v. *Holtz*, 62 Ind. 205. In that case, we have the following general statement: "There is no averment in the complaint, that the maker of the note had no property subject to execution, nor is there any evidence in the case tending to support the fact. It was therefore erroneous to decree the sale of the land to pay the debt, in the first instance."

We do not think this decision will bear the construction claimed by appellants' counsel. The error decided by it was in the judgment, and not in the complaint. There was no question presented in that case as to the sufficiency of the complaint, although it contained no averment of this kind. The

converse of that decision is, if the complaint had contained this averment, or if the proof had sustained the judgment, to order the property sold in the first instance would not have been erroneous. A party has a right to have his vendor's lien declared, whether the vendee has personal property or not. It is a lien that runs with the land for the purchase-money. *Johns* v. *Sewell*, 33 Ind. 1; *Shanefelter* v. *Kenworthy*, 42 Ind. 501. And where the vendor retains the title in his hands, the lien is the same as a mortgage, that will not be waived by the taking of other security. *McCaslin* v. *The State, ex rel. Evans, Auditor of State*, 44 Ind. 151. But if the evidence does not show that the vendee had no personal property subject to execution, in executing the declared lien the judgment should require the vendee's personal property to be exhausted before selling the land. It is not necessary to the validity of a complaint that it should contain such an allegation of the want of other property. *Stelzer* v. *LaRose*, 79 Ind. 435.

As to the objection that the complaint contained no averment of the tender of a deed for the land to Peter Feeny before the bringing of the suit, Peter alone would have a right to urge it. Appellants' rights were in no way affected by the want of such an averment.

There was an allegation that appellee was willing and ready at any time to make the proper deed to whomsoever it was properly going, upon the receipt of the balance of the purchase-money. There was no error in overruling the demurrer to the complaint.

The second error complained of is the overruling of the motion in arrest of judgment.

The same questions are presented in this motion that have been considered on the demurrer to the complaint, and for the reasons already stated, there was no error in overruling this motion.

The third question is upon the ruling of the court on appellants' demurrer to Heshion's cross complaint. The objec-

tions to this cross complaint are, that the deed from Peter Feeny to Heshion was made after the commencement of this suit, and was not recorded within forty-five days after its execution. Under these objections, we are referred to the sections of the statute upon the subject of recording deeds, and a number of decisions of this court upon the subjects of joint tenancy and survivorship.

Appellants do not claim to be subsequent purchasers without notice and in good faith before the recording of the deed, and we can not see upon what principle these provisions of the statute, or the decisions named, can have any effect upon the case at bar. The deed was good between the parties without being recorded. We see no error in overruling the demurrer to Heshion's cross complaint.

The fourth question presented is, that the court erred in its conclusions of law upon the special facts found.

The special findings are as follows:

"On the 5th day of August, 1875, the plaintiff William Feeny and the defendant Peter Feeny made a trade of certain land, Peter conveying to William 40 acres, at $60 per acre, and William contracting to convey to Peter the 55½ acres described in the complaint, to be paid for at the rate of $50 per acre. Upon the payment to William of the difference in the agreed value of the two tracts, William put Peter in possession of the land traded to him, taking his notes for the balance of the unpaid purchase-money, and he has remained in possession ever since, making improvements upon the land to the value of $500. At the time of the trade William had not the legal title to the land traded to Peter, holding a title-bond therefor, from the defendant Wade H. Evans.

"Afterwards, to wit, on the 10th day of May, 1878, Evans and wife conveyed the land by warranty deed to plaintiff William Feeny, who still holds the legal title as security for the unpaid purchase-money, evidenced by three notes, sued upon in this case, which are due and unpaid.

"At the June term, 1877, of the Hendricks Circuit Court,

the defendant Wade H. Evans recovered a judgment against defendant Peter Feeny and John and Valentine Moran for the sum of $507.45 and costs, with ten per cent. interest thereon; and at the same term defendant Polly Ann Brown recovered a judgment against defendant Peter Feeny and Valentine Moran for the sum of $208.95 and costs. On the 29th day of January, 1878, execution issued on said judgment to the sheriff of Hendricks county, and on the 1st day of June, 1878, execution also issued on said Evans judgment; and said sheriff levied said writ upon the said real estate described in the complaint, as the property of Peter Feeny. And on the 29th day of June, 1878, after legal notice, sold the same, or all the right, title and interest of said Peter Feeny therein, to the said Wade H. Evans and Polly Ann Brown for their bid, to wit, $531.25, they being the highest bidders, and at the expiration of one year, to wit, on October the 3d, 1879, executed to said Evans and Brown a deed therefor in due form of law. On the 2d day of June, 1879, Peter Feeny and wife quitclaimed the land in question to the defendant Charles Heshion, the father-in-law of Peter, for the nominal consideration of $2,500, but in reality as security for certain indebtedness due from Peter to said Heshion, and other liability as security for said Peter by said Heshion, the exact amount not being shown by the testimony.

"By the terms of the trade between plaintiff and Peter Feeny, Peter was to pay taxes on the land after being placed in possession. He allowed the taxes for 1876 to become delinquent, and plaintiff paid the same, Dec. 21st, 1877, $10.98; he also allowed the taxes for 1877 to become delinquent, and plaintiff paid the same June 7th, 1878, $29.07.

"That there is due the plaintiff from the defendant Peter Feeny, on account of unpaid purchase-money, the sum of $357.07, and on account of said taxes paid by plaintiff, the sum of $40.05.

"And as conclusions of law from the facts as found, the court finds:

"1st. That the plaintiff is entitled to a judgment against the defendant Peter Feeny for the sum of $397.12.

"2d. That said sum is a first lien upon the real estate described in the complaint, and that said land is subject to sale to satisfy said lien.

"3d. That the judgments of the defendants Wade H. Evans and Polly Ann Brown were never a lien upon said real estate.

"4th. That the sale by the sheriff to the defendants Evans and Brown, under their judgments against Peter Feeny, passed no title or interest in said real estate to said defendants Evans and Brown, and they have no interest therein at this time.

"5th. That the quitclaim deed by Peter Feeny and wife to the defendant Charles Heshion is, in legal effect, a mortgage, and subject to the prior lien of plaintiff for said purchase-money and taxes."

The objection to the conclusions of law is, that the finding is not sustained by the evidence. This objection might be urged under the motion for a new trial, but is no reason for sustaining the exception to the conclusions of law. Upon this reason there was no error in the court's overruling the exception.

The fifth alleged error, complained of, is the overruling of appellants' motion for a new trial. And the objections urged against the ruling of the court upon that motion are: That there was no evidence given on the trial that Peter Feeny had no other property subject to execution, and that appellants had notice of the supposed lien of William Feeny. Peter Feeny testified that he was unable to pay appellee's notes. Charles Heshion testified that he had furnished Peter Feeny all that he had had for some time. We think this evidence tended strongly to show that Peter Feeny had no other property subject to execution. And as to notice to appellants of appellee's claim, Evans had made the deed to appellee; it was on record. There was no deed of the land to Peter Feeny

on record; there was none in existence that appellants could have actual notice of; the record was sufficient notice to appellants that the title was yet in appellee, and they were bound to take notice of whatever interest in, claim to, or lien upon the land appellee might have.

Under the motion for a new trial it is further urged that the introduction in evidence of the deed from Peter Feeny to Charles Heshion was erroneous. This deed had been regularly recorded before the trial, and the original deed, or the record thereof, was competent evidence on the trial.

It is further insisted that error was committed upon the trial by admitting the testimony of Patrick C. Leary. This testimony was in relation to a conversation between witness, Peter Feeny and Charles Heshion, and was while negotiating for the deed from Peter to Heshion, and was in relation thereto, and, as a part of the transaction, was admissible testimony.

The evidence supported the finding, and the finding is not contrary to law. There was no error in overruling the motion for a new trial.

It is further insisted that the judgment is not in the proper form. There was no motion made in the court below to change or modify the form of the judgment, or any exception taken to its rendition. This question can not be raised for the first time in this court; it is waived by not having been presented to the court below.

We see no available error in this record. The judgment below ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be, and the same is, in all things affirmed, with costs.

ON PETITION FOR A REHEARING.

FRANKLIN, C.—Appellants, in their petition for a rehearing, insist that the court erred in holding that the judgments of Evans and Brown were not liens upon the real estate in

controversy, and that it could not be sold under executions upon said judgments.

William Feeny held the legal title to secure the payment of the balance of the purchase-money, and was ready and willing to convey whenever that was paid. There had been no fraudulent conveyance from Peter Feeny, and none had been made by William to any third party, nor did he hold the title in trust for Peter. The conveyance by Peter of his interest in the land to Heshion was to secure a good-faith indebtedness. William Feeny held the legal title as a mortgage, and Heshion held his conveyance as a second mortgage. There was no fraud shown to exist in the transaction. And, under such circumstances, the judgments of Evans and Brown against Peter created no lien upon the land, and it was not subject to sale under executions issued upon said judgments, without first applying to a court of equity and making Peter Feeny's interest in the land subject to the payment of said judgments. *Modisett* v. *Johnson*, 2 Blackf. 431; *Gentry* v. *Allison*, 20 Ind. 481; *Jeffries* v. *Sherburn*, 21 Ind. 112; *Terrell* v. *Prestel*, 68 Ind. 86; *Howe* v. *Bishop*, 3 Met. 26; *Williams* v. *Council*, 4 Jones (Law) 206; *Bauskett* v. *Holsonback*, 2 Rich. (S. C.) 624; *Doe* v. *McKinney*, 5 Ala. 719; *Wilson* v. *Beard*, 19 Ala. 629; *Smith* v. *Hinson*, 4 Heisk. 250; *Low* v. *Marco*, 53 Me. 45; *Webster* v. *Folsom*, 58 Me. 230; Freeman Executions, sec. 136, and authorities therein referred to.

In the case at bar, we think there was no error in holding that the said judgments were not liens upon the land, and that no title passed to appellees by the sale of the land. The petition for a rehearing ought to be overruled.

Per Curiam.—It is therefore ordered, upon the foregoing opinion, that the petition for a rehearing be and the same is overruled, at appellants' costs.

No. 7756.

STATE, EX REL. HAZLERIGG ET AL., *v.* EARLY, SHERIFF, ET AL.

PLEADING.—*Payment.—Sheriff's Sale.—Action on Sheriff's Bond.*—A plea of payment is a relevant and proper defence to an action against a sheriff to recover a surplus remaining in his hands from the proceeds of a sale of property on an execution against the plaintiff; and it is error to give judgment for the plaintiff as for a failure of the defendant to answer, when such plea is on file.

SAME.—A plea of payment need not state to whom the payment was made.

SHERIFF.—*Payment to Clerk of Court.—Ratification.*—To an action against the sheriff for the recovery of an alleged surplus remaining in his hands from the sale of plaintiff's property on execution, it is a good defence that the sheriff had paid the money to the clerk of the court, to whom the attorneys of record of the plaintiff, "thereunto duly authorized," had receipted for parts of the money, and the remainder, with the plaintiff's consent, had been applied by the clerk to costs taxed against the plaintiff; such facts show a ratification of the act of the sheriff in the disposition of the surplus.

PRINCIPAL AND AGENT.—*Ratification.*—The unauthorized act of an agent, or of one assuming to act as an agent, can not be accepted in part and rejected in part.

From the Jackson Circuit Court.

D. Overmyer, for appellants.

WOODS, J.—Complaint against a sheriff and his bondsmen, charging in substance, that the sheriff, by virtue of a decree of foreclosure, had sold certain real estate of the relatrix, and after satisfying the decree and costs, had remaining in his hands of the proceeds of the sale a surplus, which, on demand, he had failed and refused to pay over to the relatrix.

The defendants joined in an answer of three paragraphs, to the first and third of which the plaintiff demurred. The court sustained the demurrer to the third paragraph, and overruled that to the first, to which the plaintiff excepted; whereupon, according to the recital of the record, "the plaintiff failing and declining to reply, judgment" was "awarded the defendants on the first paragraph of the answer."

The second paragraph of answer, which is a plea of pay-

ment, seems to have been overlooked or ignored; and counsel for the appellant now insists that that plea is not good, and that, if otherwise good, it was irrelevant and should be disregarded by this court, as it was by the court below.

It is not necessary that a plea of payment allege to whom payment was made. *Demuth* v. *Daggy*, 26 Ind. 341.

And we perceive no force in the other suggestion of counsel that the relation of debtor and creditor did not exist between the sheriff and the relatrix in respect to the money sued for, and hence that the plea of payment is irrelevant and inapplicable. When an officer or private individual, who has become accountable to another for money, is sued for not accounting for, or for failing to pay or turn over, the money to the one entitled thereto, the plea of payment is necessarily pertinent, and, if interposed, should not be disregarded. Upon this plea, therefore, irrespective of the first, upon the failure and refusal of the plaintiff to reply to it, the defendants were entitled to judgment.

We are of opinion, moreover, that the first paragraph of the answer, on which the court based its judgment, is also good. It shows that the sheriff turned over the surplus in question to the clerk of the court for the use of the relators, and "that the attorneys of record of said Catharine Hazlerigg and of and for both said Catharine and William Hazlerigg, thereunto duly authorized, collected and received from the clerk of said court for the relators and for said Catharine, of said moneys, as follows: William K. Marshall and Jason B. Brown received each the sum of $130.50, and William W. Herod received $130.50, and the remainder, to wit, $35.80, was retained by consent of the relators and applied by said clerk on costs in said court, for which said Catharine and her property were liable."

We do not agree with counsel that the phrase, "thereunto duly authorized," imports no other authority than that which came from the said attorneys having been the attorneys of record of the relators in the foreclosure suit. We think it a

plain and direct averment that the individuals named, who are described as attorneys of record, had authority from the relators to receive from the clerk the sums by them respectively receipted for. But if there were any doubt of this, the fact alleged that the remaining sum of $35.80 was applied, with their approval, to the use of the relators, would seem to put the sufficiency of the plea beyond question, as it shows a ratification of the act of the sheriff in paying the money to the clerk. Without their consent, the sheriff clearly had no right to pay the money to the clerk, but was bound to pay it to the relatrix, from whose property it was derived. Code, section 479, R. S. 1881, section 762. But the relators, on learning that such disposition had been made of the money, could not ratify in part and reject in part. Their alleged appropriation, therefore, of the $35.80 was a ratification of the transfer of the whole sum by the sheriff to the clerk, if not of the payment of portions thereof by the clerk to the said attorneys, if, when made, those payments were in fact unauthorized.

Judgment affirmed, with costs.

No. 8964.

COULTER *v.* COULTER.

ARBITRATION AND AWARD. *Practice.—Motion for New Trial.*—Under the statute of February 21, 1852, relative to arbitrations and umpirages (sections 830 to 855, R. S. 1881), a motion for a new trial is not contemplated or provided for, but the proceedings are summary, and the proper mode for reserving questions for the Supreme Court is by exceptions.

SAME.—*Statutory Arbitration.—Copy of Award.—Waiver.*—In a statutory arbitration, the general rule is that it is necessary to the validity of the award that a copy thereof should be delivered to each of the parties thereto, or left at his last and usual place of residence, by one of the

arbitrators, within the time limited by law; but it is competent for either of the parties to waive, either expressly or impliedly, the delivery of a copy of the award to himself, and such waiver will validate the award as to him, on that ground.

SAME.—*Costs of Arbitration.—Evidence.—Supreme Court.—Presumption.*—When the statement of the costs of arbitration is offered in evidence and is objected to, on the ground that the costs were not ascertained, estimated and returned with the award, and the ground of objection is not apparent, nor shown to be true in fact, the Supreme Court can not say, that the trial court erred in overruling the objection and admitting the statement in evidence, and will therefore presume that the ruling of the court was not erroneous.

From the Laporte Circuit Court.

M. K. Farrand and *E. G. Thomas*, for appellant.

L. A. Cole and *C. H. Truesdell*, for appellee.

HOWK, J.—The record of this cause shows that, on the 17th day of September, 1879, the appellee produced, in open court, an agreement of submission to arbitration, and the award of the arbitrators pursuant thereto. Thereupon proof was made, to the satisfaction of the court, of such submission by a subscribing witness thereto, of the award by one of the arbitrators, and by competent evidence that a copy of the award had been duly served on the appellant, Silas B. Coulter. Upon these proofs being made, on the appellee's motion, it was ordered by the court that the submission and award be entered of record, and that a rule be granted against the appellant to show cause, on the second day of the next term of the court, why judgment should not be rendered by the court upon the award.

Afterwards the parties appeared and the cause was submitted to the court for trial. The court found that the appellant had failed to show any good or sufficient cause against the confirmation of the award, and that the appellee was entitled to a judgment thereon. Thereupon the court confirmed the award, and rendered judgment thereon for the appellee and against the appellant, for the amount of the award and interest, and the costs of suit, including the costs of arbitration, to

the rendition of which judgment, and especially the judgment for the costs of the arbitration, the appellant objected and excepted. His motion for a new trial having been overruled, and his exception saved to such ruling, he has appealed from the judgment below to this court.

Many supposed errors have been assigned by the appellant on the record of this cause; but in their brief here filed his learned counsel have expressly limited their arguments to such questions as would seem to be presented, and as they claim were presented, by and under the alleged error of the court, in overruling the motion for a new trial. It would seem, however, that a motion for a new trial is not contemplated or provided for in the statute regulating the proceedings in such cases as the one at bar, and, therefore, that the ruling of the court on such a motion would not constitute an available error in this court for the reversal of the judgment below. In *Beeber* v. *Bevan*, 80 Ind. 31, in delivering the opinion of the court, NIBLACK, J., said: "In summary proceedings like those had in this case, no motion for a new trial is contemplated, and such a motion is not necessary to reserve questions upon the evidence. Hence, the motion for a new trial entered below raises no question here."

But the evidence on the trial is in the record, by a proper bill of exceptions; and, therefore, we will consider and decide the questions discussed by counsel, although they are not presented by any proper or formal assignment of error, as it is not claimed by appellee's counsel that those questions are not before this court.

Two points are made by the appellant's counsel, in argument, against the award and the judgment thereon, each of which we will briefly consider and decide. It is insisted by counsel, that the evidence on the trial did not show the delivery of a copy of the award to the appellant within fifteen days after the signing of such award, and that it was, therefore, void. It would seem that, under the decisions of this court, as a general rule, it is necessary to the validity of a

statutory award, that a copy thereof should be delivered to each of the parties thereto, or left at his last and usual place of residence, by one of the arbitrators. *Estep* v. *Larsh*, 16 Ind. 82.

But while this would seem to be the general rule, in such cases, yet it can not be doubted, we think, that it is competent for the parties to the arbitration, or either of them, to waive the delivery to him, or them, of a copy of the award. The statute in relation to arbitrations and umpirages should be liberally construed, as it seems to us; and, when it can be done without violating the purpose and intention of the statute, the awards of arbitrators should be confirmed and enforced. *Martin* v. *Bevan*, 58 Ind. 282. In *Spencer* v. *Curtis*, 57 Ind. 221, the court said: "Each of the parties to an award has a personal right to have a true copy of the award delivered to him within the time limited by law, but this is a right which the parties, or either of them, may waive, if they, or either of them, may see proper to do so." This waiver may be made in express terms, or it may be shown by the actions of the parties, or either of them. *Marsh* v. *Curtis*, 71 Ind. 377.

In the case at bar, we are of the opinion that the evidence in the record fully justified and authorized the finding of the trial court, that the award had been duly served on the appellant, Silas B. Coulter, within the period of time specified in the statute. One of the witnesses testified on the trial that, within one week after the signing of the award, he saw the appellant in regard to the arbitration and read the award to him; that he then handed the award to the appellant, who read it for himself, and then gave it back to the witness; and that the appellant did not ask for a copy of the award. It seems to us that the evidence fairly tended to show a due and valid service of the award upon the appellant; and that the court, as the trier of the facts, was authorized to infer and find that the appellant had waived, as he lawfully might, his

personal right to the delivery to himself of a true copy of said award. We can not disturb the finding of the court, upon this point, on the weight of the evidence.

It is also claimed by the appellant's counsel, that the trial court erred in admitting in evidence a written statement of the costs of the arbitration. The bill of exceptions shows that, when this statement of costs was offered in evidence, "the defendant then and there objected on the ground that the costs mentioned therein were not ascertained, estimated and returned with the award; which objection was overruled by the court, and to this ruling the defendant then and there excepted." The ground of appellant's objection to the offered evidence was not apparent, or, if it was, the record does not show it to have been true in fact, nor was it shown to be true by affidavit or oral evidence. The record fails to show that the court erred in overruling the appellant's objection to the offered evidence; for it fails to show that the costs were not, in truth and in fact, ascertained, estimated and returned with the award. As the question is presented here, we can not say from the record before us, that the trial court erred in overruling the objection to the offered evidence; and, therefore, we must assume that no such error was committed. All fair and reasonable presumptions will be entertained in favor of the decisions of the circuit court, until such decisions are clearly shown to be erroneous by the record of the cause. *Myers* v. *Murphy*, 60 Ind. 282; *Stott* v. *Smith*, 70 Ind. 298; *Bowen* v. *Pollard*, 71 Ind. 177.

We are of the opinion that the court did not err in confirming the award of the arbitrators, and rendering judgment thereon, for the amount thereof and interest, and for the costs of suit, including the costs of the arbitration.

The judgment is affirmed, with costs.

No. 8514.

Greenewald v. Rathfon.

Contract.—*Partnership.—Fraud.—Receiver.—Complaint.—Verdict.—Judgment.—Excessive Damages.—Vendor and Purchaser.*—Complaint in two paragraphs, alleging fraudulent representations whereby the plaintiff was induced to purchase for $1,281 an interest in the property, machinery and trade of a factory worth only $800, and become a partner. One paragraph prayed damages, the cancellation of a note given for part of the purchase-money, and for general relief; the other added a prayer to annul the contract. The verdict found for the plaintiff damages in the sum which had been paid, and that the note be cancelled, but was silent as to annulling the contract.

Held, that the complaint was good on demurrer.

Held, also, that the damages were excessive, since a judgment in accordance with the verdict would leave the plaintiff owner of the property bought.

From the Cass Superior Court.

F. Swigart, for appellant.

M. Winfield and *Q. A. Myers*, for appellee.

Newcomb, C.—The appellee filed a complaint of two paragraphs against the appellant. The averments of each paragraph were similar, with one exception, and were to the effect that the appellant was engaged in the business of manufacturing cigar boxes in the city of Logansport, and that to induce appellee to purchase one-half of the stock in trade and machinery of said manufactory, and to become an equal partner with appellant in said business, the appellant made to appellee certain false and fraudulent representations touching the profits of said business; and that the appellee, being ignorant in the premises and relying on said representations as true, was thereby induced to and did purchase from appellant one-half of said machinery and stock in trade, for which he paid appellant $900 in money, and executed his notes for $381 additional, which were secured by a mortgage on the one-half of the machinery so purchased. As a part of the transaction, the parties entered into a written contract of partnership for

carrying on said box factory in the city of Logansport. This contract provided that each partner should furnish one-half of the machinery and stock of the concern, but was silent in regard to said purchase by appellee from the appellant.

It was further averred, that the plaintiff, under the terms of the partnership agreement, went into the box factory and engaged in the manual labor of manufacturing cigar boxes; that he worked therein faithfully for a period of three and one-half months; that during all that period he was able to draw from the proceeds of said business only $11 for the support of his family; that said business was not profitable, but, on the contrary, was a losing business, and was such before plaintiff became such partner; that the representations, so made by the defendant to induce the plaintiff to make said purchase and enter into said contract of partnership, were known by the defendant to be false when he made them, and that they were made for the fraudulent purpose of cheating and defrauding the plaintiff; that, after so working for three and one-half months, plaintiff informed the defendant that he, plaintiff, must abandon the box factory and seek work elsewhere, by which he could support his family, to which defendant assented, and plaintiff did leave and seek employment elsewhere, leaving the machinery and other property of the partnership in possession of the defendant, who continuously thereafter held possession and enjoyed the same.

The first paragraph further charged that said stock and machinery were not, in fact, worth more than fifteen or sixteen hundred dollars, instead of $2,462, at which rate plaintiff paid for one-half thereof, in consequence of such fraudulent representations of the defendant.

The prayer of the first paragraph of the complaint was for a dissolution of the partnership, for one thousand dollars damages, the cancellation of said notes for $381, for the rent of the premises and machinery subsequent to September 4th, 1877; that a receiver be appointed to wind up the concern, and for all proper relief. The prayer of the second paragraph

was, that the contract of partnership be declared null and void; that the defendant be compelled to surrender for cancellation said notes and mortgage, and be enjoined from transferring the same; that plaintiff recover back the money so paid to defendant, with interest, and for all other proper relief.

The court denied the application for the appointment of a receiver.

Demurrers to the separate paragraphs of the complaint were properly overruled; each contained facts sufficient at least to authorize a recovery of such damages as the plaintiff could show he had sustained by the alleged fraud of the defendant.

Issues of fact being joined, the cause was submitted to a jury, who returned the following verdict:

"We, the jury, find for the plaintiff, and assess his damages at ($979.90) nine hundred and seventy-nine dollars and ninety cents; and we do further find that the notes and mortgage executed by plaintiff to defendant, bearing date May 15th, 1877, and June 5th, 1877, and described in the complaint and cross complaint, should be surrendered and cancelled.

"SAMUEL H. SUELL, Foreman."

The defendant moved for a new trial, and among the causes therefor was the following: "The damages assessed by the jury are excessive."

We think this objection to the verdict was well taken. The jury allowed the entire sum the plaintiff had paid in money, with interest thereon, and also found that the defendant should deliver up the plaintiff's notes and mortgage, thus placing the plaintiff in the most favorable attitude he could occupy, if he had rescinded the contracts of purchase and partnership on the ground of fraud. But no rescission, or attempt at rescission, was averred or proved; on the contrary, the complaint itself recognized the partnership as still existing, and prayed for its dissolution, and the appointment of a receiver. So far as appears from the record, the plaintiff, after this verdict and judgment, was still the owner of one-half the machinery, yet without doing anything to divest himself of such ownership,

and transfer it to the defendant, the plaintiff recovered the full price paid for it, with interest.

On the trial the defendant, Greenewald, testified that about two weeks after plaintiff left the factory, they agreed upon a dissolution of the partnership; that Rathfon invoiced the stock, and Greenewald took it at said invoice, and agreed to pay the debts of the partnership, and to pay Rathfon $50 per year for the rent of the machinery, and to pay building association dues of $6.75 per month for Rathfon, which he had continued to do since the dissolution.

No witness contradicted this testimony of the defendant touching a dissolution of the partnership and its terms. The plaintiff was called as a witness in rebuttal, and testified as follows on this subject: "It was agreed by both parties at the time we dissolved that the contract of dissolution should be reduced to writing. McNary was to draw it up. I asked Greenewald why he had not signed the contract; said he had not signed it because it did not suit him. * * * I did not ask Greenewald to pay building association dues after suit; my requests were all made before suit was brought. I asked him to pay building association dues after he had refused to sign the contract of dissolution. The agreement to reduce the contract to writing was made some weeks after I went to the railroad shop to work. We dissolved, I think, about two weeks after I went to the shop, and I went to it as soon as I left the box factory."

The reason given by Greenewald why the contract of dissolution had not been signed was, that when they called at McNary's for that purpose, they found that the writing did not correspond with the terms of the contract of dissolution.

The machinery was valued by the different witnesses, as follows: By the plaintiff, at $1,500; by Alfred McAllister, a machinist, at $1,700 to $1,800; by Charles Knouse, also a machinist, at $1,600, and by the defendant at $2,200.

Taking the plaintiff's own testimony as the basis of value, he still had a property of $750 in the machinery, after obtain-

ing a verdict and judgment for the recovery of all the consideration paid for it.

This statement of the evidence on the foregoing points shows conclusively that the damages found by the jury were excessive, and that the verdict ought to have been set aside. On the complaint and proofs, if entitled to recover, the plaintiff's measure of damages, so far as the purchase of the machinery and stock in trade were concerned, was not the contract price, but the deficiency in value below the contract price, in consequence of the unprofitable character of the business.

The court erred in overruling appellant's motion for a new trial, for which cause the judgment ought to be reversed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment below be and the same is hereby reversed, at the costs of the appellee, and that said cause be remanded, with instructions to sustain the motion of the appellant for a new trial.

ON PETITION FOR A REHEARING.

FRANKLIN, C.—Appellee, in his petition for a rehearing, insists that the court erred in holding that the damages are excessive, which was the only question presented in the case.

There appears to be a difference of opinion between appellee's counsel and the court, in relation to the nature and purport of the action. If the action is for damages only resulting from the alleged fraud of appellant, as viewed by the court, the amount of damages assessed is excessive; but if the action is to cancel and set aside the contract and partnership, on account of fraud, and place the parties *in statu quo*, and the verdict of the jury and judgment of the court have that effect, the damages would then seem to be about right, and the judgment ought not to be reversed.

The complaint consists of two paragraphs.

The first sets out the contract, partnership, and false representations, and avers that the plaintiff was damaged by the alleged fraud in the sum of $1,000; prayer for a judgment of

$1,000 damages, a dissolution of the partnership, a surrender of the notes and mortgage for cancellation, an allowance for rent of the premises since September 4th, 1877, and that a receiver be appointed to settle and wind up the concern.

This paragraph seeks alone to recover damages for the fraud, treating the contract and partnership as valid, and seeks to enforce them by having the partnership wound up and settled by a receiver.

The second paragraph of the complaint alleges the contract, partnership and fraud in a very similar manner to the first, and concludes by praying for judgment, "that the contract of partnership be declared null and void; that the defendant be compelled to surrender for cancellation said notes and mortgage, and be enjoined from transferring the same; and that he recover back the money paid, laid out and expended by him, with interest thereon, in all amounting to the sum of $1,200, and for all proper relief."

This paragraph may be considered as in harmony with appellee's theory of the object of the action. The appellant answered generally in denial, and the notes and mortgage as set-offs, and by way of cross complaint.

We must, therefore, look to the verdict and judgment to determine upon which paragraph of the complaint the plaintiff succeeded. The verdict reads as follows:

"We, the jury, find for the plaintiff, and assess his damages at ($979.90) nine hundred and seventy-nine dollars and ninety cents; and we do further find that the notes and mortgage executed by plaintiff to defendant, bearing date May 15th, 1877, and June 5th, 1877, and described in the complaint and cross complaint, should be surrendered and cancelled."

The court rendered the following judgment: "It is therefore considered and adjudged by the court, that the plaintiff do have and recover of and from the said defentant, Henry Greenewald, the sum of nine hundred and seventy-nine dollars and ninety cents, so assessed by the jury aforesaid, together

with his costs and charges herein accrued and to accrue; and it is further ordered and adjudged by the court, that the notes and mortgage described in plaintiff's complaint be declared cancelled, and that the partnership between the parties be dissolved."

This verdict of the jury and the judgment of the court follow the prayer of the first paragraph of the complaint, and not the second. We must therefore conclude that the cause was tried, and a result reached, upon the theory of the first paragraph, and not of the second paragraph of the complaint. The verdict treats the contract as in force by giving damages for the fraud and cancelling the notes and mortgage, and the judgment, in addition, treats the partnership as in existence, by declaring it dissolved.

Appellee had agreed to pay $1,281 for half of the concern in which they formed a partnership; he had paid $900, and given his notes and mortgage for the remainder. He avers in his complaint that the whole partnership property was not worth more than $1,600, and testified to the same on the trial. This judgment does not dispose of the partnership property, but leaves that as it stood before the commencement of this action. The judgment, instead of giving to appellee his damages on account of the alleged fraud, which would be the difference between what he agreed to give for the property, and what it was worth, gives to him all that he had paid, with interest, and cancels the addition that he had agreed to pay, and leaves the property purchased still belonging to him.

We think there can be no doubt about the amount of damages in this case being excessive.

There was no error in the original opinion and decision in this case.

The petition for a rehearing ought to be overruled.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the petition for a rehearing be and the same is in all things overruled, at appellee's costs.

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No. 9340.

BOESKER ET AL. *v.* PICKETT.

EXECUTION.—*Exemption.—Diligence.*—Exemption of property from sale on execution is a right to be asserted at the time and in the manner provided by law, and by a person showing himself within the statute creating it, or it is lost.

SAME.—*Action for Possession.—Evidence.*—In an action against an officer for property claimed as exempt, evidence that a schedule containing a description of the property was presented to him and a demand made to set it apart, and his return showing its seizure, make a *prima facie* case.

SAME.—*Offering Different Schedules.*—Whether one claiming exemption has offered schedules not containing the property claimed in the last, is a question of fact for the court or jury trying the issue, and at most he has the burden of explaining his acts.

SAME.—*Sale and Rescission.—Fraud.—Supreme Court.*—That property claimed as exempt has been sold and regained by a rescission, does not deprive the owner of his privilege, and where the sale is found by the trial court to have been without fraud and rescinded, the Supreme Court can not say that its finding was not fully supported by the evidence.

PLEADING.—*Specific Allegations of Title Control.*—Where a pleading contains both general and specific allegations of title, the specific control, and, if they show no title, they will not be aided on demurrer by the general allegations and the conclusion.

SAME.—*Value.*—An allegation, that "Said property does not exceed in value the sum of $600," sufficiently shows the value of the property claimed as exempt.

From the Wayne Circuit Court.

C. B. Walker and *J. E. Graham*, for appellants.

W. A. Peelle and *D. W. Comstock*, for appellee.

ELLIOTT, J.—The appellee sought and obtained a judgment for personal property claimed by him to be exempt from execution.

The questions first presented are those arising upon the ruling on the appellants' demurrer to the complaint.

It is said that, as to one of the appellants, the complaint does not even profess to state a cause of action, and does no more than name him as one of the defendants.

Treating the demurrer as a separate one, and not as joint,

although it is doubtful whether this can be properly done, we shall dispose of the question argued. The allegation is that the defendants wrongfully have possession of the appellee's property, and that the "defendants" refused to have the property appraised and set apart to the plaintiff. The use of the plural noun "defendants" applies the cause of action stated not to some, but to all, of the defendants. Where a complaint names several defendants and charges them all with having unlawful possession of the plaintiff's property, it can not be justly said that it alleges a cause of action against part of them only. The demurrer admits the alleged wrongful seizure and detention to be by all, and not by a part, of the defendants.

It may be that there is some uncertainty in the allegations of the complaint as to the appellant Seaman, but, if so, the remedy is not by demurrer, but by motion. It is seldom that uncertainty is cause of demurrer.

The real question upon the complaint is whether it states a cause of action against any of the appellants.

Where a complaint contains a general allegation of title, followed by a specific statement of the facts constituting title, the latter must control. If the specific statement shows that the plaintiff has in fact no title, the general allegation is broken down. If the rule were otherwise, it might often happen that the pleader's conclusion that he possessed title would prevail, although the facts showed him to have none. *Reynolds* v. *Copeland*, 71 Ind. 422; *Heavilon* v. *Farmers Bank, etc.*, *ante*, p. 249.

Whether the appellee's complaint shows title to the property claimed, depends upon the facts stated as constituting it, and whether the facts show title depends upon whether they show a right to have the property claimed exempted from seizure upon execution. The right to exempt property must be asserted at the time and in the manner provided by law. It is a privilege which the debtor may lose by a failure to pursue the course prescribed by the statute which bestows the right. *The State, ex rel.*, v. *Melogue*, 9 Ind. 196; *Zielke* v.

Morgan, 50 Wis. 560; *Russell* v. *Lennon*, 39 Wis. 570; *Pond* v. *Kimball*, 101 Mass. 105. The person who asserts the right must show himself to be within the statute creating the exemption.

The contention of appellants is that the complaint fails to allege that the appellee's inventories, tendered to the officers holding the writs, contained all the property of which he was the owner. The position rests upon a mistaken view of the complaint. It does allege that the schedules contained a full and true exhibit of all the property of which he was the owner, or in which he had any interest. It appears, also, that the value of the property claimed as exempt did not exceed $600, the amount allowed by law. The appellants are also in error in supposing that the complaint does not state the value of the property. It is alleged, somewhat awkwardly it is true, "said property does not exceed in value the sum of $600." The allegation, detached though it is, and not very well placed in the pleading, is still sufficient to show the value of the property claimed.

It is said that there is no evidence at all justifying a finding against the appellant Seaman. We think otherwise. It appears that he levied an execution upon the personal property, that a schedule was presented to him, and a demand made to set apart the property. The return shows the seizure of the property, and this was sufficient evidence against Seaman, who, it appears, was the officer into whose hands the writ came. The return of an officer is sufficient evidence of seizure, to make at least a *prima facie* case. We need not enquire as to its conclusiveness.

It was proved that sometime before the last schedules were presented, the debtor had offered others in which the property involved in this action was not described. The fact, that the appellee presented schedules different from those now relied on, does not preclude him from securing his just exemption. The fact was one for the consideration of the court trying the cause, and should have its due weight upon the question

of the good faith of the party, and of the validity of his claim to the property, but we do not regard it as concluding him from afterwards presenting correct schedules. The debtor should not be held conclusively estopped, but the fact should be deemed of sufficient materiality to cast upon him the burden of satisfactorily explaining his acts. Whether the explanation is or is not a reasonable one, is a question of fact to be determined by the court or jury by whom the case is tried.

It appears from the evidence that on the 28th day of January, 1880, appellee sold the property in controversy; that sometime afterwards, and before the delivery of the last schedules, the sale was rescinded. It is asserted by the appellants that the appellee can not claim the property as exempt. We are unable to perceive any reason upon which this position can rest. The appellee was entitled to the exemption provided by the statute, and this right was not defeated by the fact that he had once sold the property, and afterwards regained it by a rescission of the sale. If the property was actually owned by him, and was within the amount allowed by law, he was entitled to claim it as exempt, although he had once sold it, and had a second time become its owner, by rescinding the contract of sale.

It is argued that the sale was a fraudulent one, made for the purpose of cheating creditors, and that, therefore, the appellee has lost his right to exempt the property. The court, however, found that the sale was not a fraudulent one, and that the contract had been rescinded. Fraud is purely a question of fact, and we can not disturb the finding upon it, unless the finding is clearly contrary to the evidence. *Holman* v. *Martin*, 12 Ind. 553. We can not, in the present case, interfere with the finding of the court, for there is evidence fully supporting it.

Judgment affirmed.

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No. 7998.

STATE, EX REL. MORLEY, *v.* GALLAGHER ET AL.

CONTESTED ELECTION.—*Quo Warranto.*—*Jurisdiction.*—The right to an office may be contested and tried upon information filed in the circuit court, under sections 749 and 750, 2 R. S. 1876, pp. 298 and 299, notwithstanding the special statutory provisions for the contest of elections.

From the Tippecanoe Circuit Court.

W. C. Wilson and *J. H. Adams*, for appellant.

WOODS, J.—Information by the relator, against the appellees Gallagher and Mueller, under article 44 of the code, to try the right to the office of trustee of Fairfield township, Tippecanoe county, Indiana.

The circuit court sustained separate demurrers by the defendants for want of facts to the complaint, and, the appellant not amending, gave judgment for the defendants. This was done in February, 1879.

We have no brief from the appellee, but are informed by counsel for the appellant, that the court below acted upon the view, "that inasmuch as the relator had failed to proceed under the law providing for the contest of elections, and within the time therein provided, he had lost his right of action, and could not proceed under the 44th article."

On this proposition, this court has held otherwise in the case of *The State, ex rel.*, v. *Adams*, 65 Ind. 393, and as there is no other ground upon which it has been suggested, or in respect to which it has occurred to us, that the complaint is defective, we are constrained to hold it good.

It shows among other things, that next to Gallagher, who was ineligible on account of having held the office for four years next preceding the election (*Jeffries* v. *Rowe*, 63 Ind. 592), the relator, who was eligible, received the highest number of votes; that the auditor had undertaken to appoint the appellee Mueller to the office; that Gallagher had qualified, and was in possession, and had refused to surrender to the relator,

and that the plaintiff had tendered to the auditor a proper bond, duly executed by himself and sureties, and had offered to take the oath of office, which had been refused.

Judgment reversed, with costs, and with instructions to overrule the demurrers to the complaint.

No. 10,053.

The State v. Tumey.

Criminal Law.—*Reserved Question of Law.—Appeal Sustained.—No Reversal of Judgment.—Costs.*—During the prosecution of a criminal cause, the prosecuting attorney may, by bill of exceptions, under section 1846, R. S. 1881, reserve any point of law for the decision of the Supreme Court. And, if the defendant be acquitted, the prosecuting attorney may, within one year, take the reserved case to the Supreme Court, upon appeal; there shall be no reversal of the judgment, on such appeal, but the opinion of the Supreme Court shall be the uniform rule of decision in inferior courts, and if the decision below is held to be erroneous, the appellee must pay the costs of appeal.

Same.—*Foreign Insurance Company.—Certificate of Auditor of State.—Duty of Agent.*—Under section 3765, R. S. 1881, a foreign insurance company is not required to file, in the county clerk's office, a certificate of the auditor of State showing that it is authorized to do business in the county; but it is made the duty of any agent of any such company, who assumes to act as such agent in the transaction of insurance business in any county, to procure and file in the office of the clerk of the circuit court of the county a certificate from the auditor of State, showing that he is authorized to act as such agent in the transaction of insurance business, for such company, in such county.

Same.—*Embezzlement by Agent.—Illegal Consideration or Premiums.—Defence.*—Where an agent of a foreign insurance company is prosecuted for the embezzlement of the moneys of the company received by him, in the course of his agency, as embezzlement is defined in section 1944, R. S. 1881, it is no defence that such agent had not complied with the requirements of section 3765, R. S. 1881, in regard to his agency, and had therefore received such moneys for the company, upon an illegal consideration and in the transaction of an unlawful business.

From the Huntington Circuit Court.

C. W. Watkins, Prosecuting Attorney, for the State.

HOWK, J.—In this case, an indictment was returned into the court below, on the 10th day of January, 1882, which charged in substance, that the appellee, on the 1st day of November, 1881, at Huntington county, Indiana, "did then and there unlawfully and feloniously, being then and there the agent of a certain association, called the Ohio Mutual Aid and Life Association, of Bellefontaine, Ohio, and having access to and control over and the possession of fifteen dollars, to the possession of which his employers, the said Ohio Mutual Aid and Life Association, were then and there entitled, and, while in and during such employment, did then and there take, purloin, secrete and appropriate to his own use, without then and there having the consent of his employers, the said association, the said sum of fifteen dollars, the same being money of the value of fifteen dollars, of the personal goods and chattels of the said Ohio Mutual Aid and Life Association, of the lawful current money of the United States of America, and said money being paid and delivered to the said Ami Tumey, by Jacob G. Hoffman, for said association, contrary to the form of the statute," etc.

Upon arraignment and plea of not guilty, the appellee was tried by a jury and acquitted of the offence charged against him in the indictment, and judgment was rendered accordingly.

The prosecuting attorney, on the trial of the cause, excepted to an opinion or ruling of the court, and has reserved the point of law for the decision of this court. The bill of exceptions shows, that after the State had introduced its evidence and rested, the appellee, to maintain his defence, under his plea of not guilty, offered as a witness Willis A. Jones, who testified to his name, and that he was the clerk of the Huntington Circuit Court; that the appellee then propounded to the witness the following question, to wit:

"You may state to the jury, whether or not the Ohio Mutual Aid and Life Association, of Bellefontaine, Ohio, filed

in your office a certificate from the auditor of the State of Indiana, showing that they are authorized to do business in Huntington county?"

That to this question the State, by its prosecuting attorney, objected on the following grounds:

"1st. That the said association was not compelled to file such authority; and,

"2d. That, if said authority had not been filed by such company, it was a thing the defendant could not set up as a defence to an indictment for embezzlement of money that he had collected for such company."

And that such objection was by the court overruled, to which ruling the State, by its attorney, at the time excepted.

It is manifest that the appeal in this case was intended and attempted to be taken, under and pursuant to the provisions of section 271 of the criminal code of 1881, being section 1846 of R. S. 1881. This section reads as follows: "The prosecuting attorney may except to any opinion of the court during the prosecution of any cause, and reserve the point of law for the decision of the Supreme Court. The bill of exceptions must state clearly so much of the record and proceedings as may be necessary for a fair statement of the question reserved. In case of the acquittal of the defendant, the prosecuting attorney may take the reserved case to the Supreme Court upon an appeal at any time within one year. The Supreme Court is not authorized to reverse the judgment upon such appeal, but only to pronounce an opinion upon the correctness of the decision of the court below. The opinion of the Supreme Court shall be binding upon the inferior courts and shall be a uniform rule of decision therein. When the decision of the court below is decided to be erroneous, the appellee must pay the costs of the appeal."

The bill of exceptions, in the case now before us, does not state so clearly as it ought to and might have done, so much of the record and proceedings as was necessary for a fair state-

ment of the question of law reserved for the decision of this court. No objection is made here, however, to the sufficiency of the bill of exceptions on this ground; and as we think we can gather from the contents of the bill the point of law intended to be reserved, we will pronounce our opinion upon the correctness of the decision of the court below upon that point of law. It may be premised that the question propounded to the witness Jones, and above quoted, was objectionable in form, if not in substance, in this, that it is apparently assumed therein that the Ohio Mutual Aid and Life Association, of Bellefontaine, Ohio, was a foreign insurance company. If the association were such a company, it was a fact which ought not to have been assumed, but it ought to have been shown by competent evidence. It may possibly have been inferred, from its name and location, that the association was a foreign life insurance company, but such inferences are not always reliable. Waiving this point, however, and assuming, as it seems to have been assumed below, that the association was a foreign insurance company, the question for decision is this: Did the trial court err in overruling the State's objections to the question quoted?

It seems to us, that the first objection of the State to the question propounded was well taken, and ought to have been sustained. The question seems to assume that it was the legal duty of the association to have filed in the office of the clerk of Huntington county a certificate from the auditor of this State, showing that it was authorized to do business in that county. The State's first objection to the question was, in effect, that the law did not require the association to file such a certificate in such clerk's office. The only law of this State, on the subject of the filing of such a certificate in the clerk's office, is the act of March 3d, 1877, to amend section 1 of the act of December 21st, 1865, regulating foreign insurance companies doing business in this State, etc., and adding supplemental sections thereto. There is no provision in this act which requires a foreign insurance company to file

in the county clerk's office a certificate from the auditor of State, showing that it is authorized to do business in the county; but the act does require, in clear and positive terms, that the person who assumes to act as the agent of such a company in the transaction of insurance business, in any county, shall procure and file in the office of the clerk of the circuit court of the county, a certificate from such auditor, showing that he, as such agent, is authorized to transact the business of insurance for such company, in such county. Clearly, therefore, as it seems to us, the court below erred in overruling the State's first objection to the question above quoted.

The question propounded to the witness, Jones, was evidently asked by the appellee, and allowed by the court, upon the theory that, if no such certificate from the auditor of State had been filed in the office of the clerk of the Huntington Circuit Court, either by the association or by the appellee, as its agent, then the money received by the appellee, as the agent of such association in Huntington county, was received upon an illegal consideration, and in the transaction of an unlawful business. The conclusion drawn from this theory was, that even if the appellee, as the agent of the association in Huntington county, had received moneys belonging to the association, it was received by him upon such illegal consideration, and in the transaction of such unlawful business; and that, therefore, the appellee could not be and was not guilty of the crime of embezzlement, in secreting, purloining or appropriating to his own use the said moneys so received by him, as such agent of such association. The theory of the question was, perhaps, right under the law; but the conclusion drawn from this theory was, we think, radically erroneous.

In civil actions, it seems to be settled law, in this State, that where money due to the principal, on an illegal transaction, has been paid to his agent for such principal, by the party from whom it is due, the principal may recover such money from such agent. "For," says Judge Story, in his treatise on Agency, sec. 347, "the contract of the agent to pay the

money to his principal is not immediately connected with the illegal transaction; but it grows out of the receipt of the money for the use of his principal." So, in Dunlap's Paley's Agency, 62, it is said: "If money have been actually paid to an agent for the use of his principal, the legality of the transaction, of which it is the fruit, does not affect the right of the principal to recover it out of the agent's hands." This doctrine has been repeatedly recognized by this court, and, accordingly, it has been held that, in such cases as the one at bar, the principal may recover of the agent the moneys received by the latter, for the use of the former, in the course of the agency. Thus, in *The United States Express Co.* v. *Lucas*, 36 Ind. 361, this court said: "The obligation of the agent to account for the money is separate and distinct from the contracts of the company with third persons, which were the subject-matters of the statute. To hold that the agent is not bound to account for the money received by him, is to sanction an act of the grossest dishonesty and bad faith on the part of the agent, without the accomplishment of any equivalent benefit to any one, or to the public. On account of some unintentional omission in an honest effort to comply with the law, for which the agent is probably as much in fault as the principal, the agent sets his principal at defiance, denies his right to the money, and not refunding it to the parties who paid it to him, is allowed to retain it himself."

Applying this doctrine to the question reserved in the case now before us, it is clear that, as between the Ohio Mutual Aid and Life Association and the appellee, as its agent, the money received by the latter, in the course of his agency, for the former, is the absolute property of such association. If the appellee, as charged in the indictment, unlawfully and feloniously took, purloined, secreted and appropriated to his own use the money so received by him, as such agent, in the course of his agency, belonging to his principal, he was guilty of the offence of embezzlement, as the same is defined in section 43 of the act of April 14th, 1881, concerning public of-

fences, being section 1944, R. S. 1881. In such a case, it seems to us that the fact, if it were the fact, that the appellee received such money, as such agent, for his principal, the association, upon an illegal consideration, and in the transaction of an unlawful business, did not constitute any valid or sufficient defence to him, the appellee, in this prosecution against him for his alleged embezzlement of such money.

We are of the opinion, therefore, that the court erred in overruling the second objection of the State to the question above quoted.

The appeal of the State, in this case, is sustained, at the appellee's costs.

No. 10,255.

Gilbert v. The State.

Criminal Law.—*Sabbath Desecration.*—*Indictment.*—In a prosecution for desecration of the Sabbath, under section 95, Acts 1881, p. 194, R. S. 1881, section 2000, the indictment alleged that the defendant, on the 4th day of December, 1881, unlawfully engaged in common labor, and his usual vocation, by selling cigars.

Held, that the indictment was insufficient for failing to allege that the sale was on some day known and commonly called Sunday.

Held, also, that proof must be made of the sale on some particular Sunday within a time not barred by the statute of limitation of six months, section 1504, R. S. 1881.

From the Montgomery Circuit Court.

D. A. Roach and *N. P. H. Proctor*, for appellant.

D. P. Baldwin, Attorney General, *W. W. Thornton* and *J. H. Burford*, Prosecuting Attorney, for the State.

Niblack, J.—This was a prosecution upon an indictment for what was claimed to be a violation of the statute for the protection of the Sabbath. Acts 1881, p. 194, sec. 95.

Gilbert v. The State.

The indictment charged the appellant, Demas Gilbert, a person over the age of fourteen years, with having, on the 4th day of December, 1881, at the county of Montgomery and State of Indiana, unlawfully engaged in common labor, and his usual vocation, by then and there selling and delivering to one Wallace A. Stilwell two cigars, at and for the price of ten cents, such sale and delivery not being a work either of charity or necessity.

The appellant moved to quash the indictment upon the ground that it did not also charge that the alleged offence was committed on the first day of the week, commonly called Sunday, but his motion was denied. A trial and conviction of the appellant followed.

The appellant maintains that the indictment was neither in the words of the statute nor in equivalent words, in its description of the offence intended to be charged, and that, consequently, the motion to quash it ought to have been sustained.

On behalf of the State, it is contended that the 4th day of December, 1881, fell on Sunday, and that we must take judicial knowledge of the fact that that day was Sunday; that for that reason it was sufficiently charged that the sale of the cigars was on Sunday.

Under the indictment, the State was at liberty to prove the sale of cigars on any day within six months preceding the time of the return of the indictment into court, as the precise time of the sale was immaterial, provided it was not fixed at so remote a period as to make it barred by the statute of limitations; but the *gravamen* of the offence evidently intended to be charged was the unlawful engagement by the appellant on Sunday, in his usual vocation of selling cigars. To make out that offence, it was necessary to confine the proof to some particular Sunday within a time not barred by the statute. *Pancake* v. *The State*, *ante*, p. 93.

In order that the proof might have been so limited at the trial, it was necessary that the indictment should have charged that the sale was on some day known as and commonly called

Sunday. Moore's Criminal Law, sections 679, 680; *The State* v. *Land*, 42 Ind. 311; *Clark* v. *The State*, 34 Ind. 436.

The court, therefore, erred in overruling the motion to quash the indictment.

The judgment is reversed, and the cause remanded for further proceedings.

No. 8335.

HATHAWAY, EXECUTOR, *v.* ROLL.

DECEDENTS' ESTATES.—*Claim.—Pleadings.—Promissory Note.—Consideration.*—The testator executed to the appellee a paper as follows: "July 5th, 1870. When I am gone, for value received, I promise my grandchild, Sarah E. Roll, to pay her or order five hundred dollars, with interest from date ten per cent. Jonas Williams. Lucy, this is due to Sis, when I am done with it—is for staying with you. Jonas Williams."

Held, that this, with the affidavit required, was a sufficient complaint upon a claim against an estate.

Held, also, that the instrument, duly proved, sufficiently established a consideration for its execution, so that the Supreme Court would not disturb an allowance upon it.

From the Fayette Circuit Court.

C. Roehl and *W. C. Forrey*, for appellant.

W. A. Bonham and *R. Conner*, for appellee.

FRANKLIN, C.—This is a claim filed by the appellee Sarah E. Roll against the appellant, Peleg Hathaway, as executor of the will of Jonas Williams, deceased.

There was an issue formed by a general denial. Trial by the court, and a finding for appellee in the sum of $569.43.

A motion for a new trial was overruled, and judgment rendered upon the finding.

The errors assigned in this court are, the overruling of the motion for a new trial, and that the complaint does not state facts sufficient to constitute a cause of action.

The complaint consisted of a note with indorsements of credits thereon, and an affidavit attached thereto that the same was correct; that no payment had been made thereon except the credits endorsed, and that there was no set-off against the same. The note is as follows:

"July 5th, 1870. When I am gone, for value received I promise my grandchild, Sarah E. Roll, to pay her or order five hundred dollars ($500), with interest from date ten per cent. JONAS WILLIAMS.

"Lucy, this is due to Sis, when I am done with it—is for staying with you. JONAS WILLIAMS."

We think this is a sufficient cause of action for a claim against an estate.

The reason stated for a new trial is, that the finding of the court is contrary to the law and the evidence.

The defence discussed by counsel is that there was no sufficient consideration for the note.

The plaintiff proved the execution of the note and read it in evidence, which was all the evidence given by the plaintiff.

The defendant proved that the plaintiff, Sarah E. Roll, was the daughter of Lucy, who was the daughter of deceased, and the wife of Matthias Roll, that they called their daughter Sis; that said Matthias Roll had a claim then pending in court against the said estate of Jonas Williams. It was agreed that Jonas Williams died September 11th, 1877, aged ninety-three years. This was all the evidence given in the cause.

There was no evidence as to the consideration of the note, except as stated in the *addendum* to the note.

A promise, without any consideration, to pay after death, can not be construed into a gift; but services rendered to a third party are a sufficient consideration for a note.

The note states that it was given for appellee's staying with her mother; the nature of the services, other than staying with her mother, is not given. But from the age of the grandfather at the date of the execution of the note, we presume that the mother was old enough to need the services of

her daughter, and that the daughter was old enough to render her valuable services. And that the daughter after she arrived at the age of majority remained with the mother, would alone be a sufficient consideration to support the note.

We think the evidence supported the finding of the court, and that the finding was not contrary to the law or the evidence.

There was no error in overruling the motion for a new trial. The judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment below be and the same is in all things affirmed, with costs.

No. 9063.

PORTER ET AL. v. REID.

PLEADING.—*Counter-Claim.—Practice.*—A pleading filed as an answer, and bad as such, may, if its averments are sufficient, be treated as a counter-claim.

SAME.—*Mortgage Liens, Priority of.*—One who is made defendant to a complaint to foreclose a mortgage, and who holds a prior lien, may, by counter-claim, have the priority established.

SAME.—*Special Finding.—Practice.*—Where, to a complaint to foreclose a mortgage, a defendant by counter-claim sets up a prior mortgage, seeking to have the priority established, to which the answer is a general denial and payment, a special finding that the defendant's mortgage, though it describes the property embraced in the plaintiff's mortgage, was not so intended, and a conclusion of law that it is not a prior lien, are not within the issues, and therefore irrelevant, and an exception thereto should be sustained.

SAME.—*Answer.—Mistake.—Description of Land in Mortgage.*—An answer to a counter-claim which sets up a prior mortgage on the premises (on which the plaintiff seeks a foreclosure), alleging a material mistake in the description of the lands in the defendant's mortgage, and that it was not intended to include the same lands, is good on demurrer.

SAME.—*Evidence.*—When real estate is conveyed by metes and bounds or any other certain description, this will control the quantity, although not correctly stated in the conveyance, and parol evidence is not admissible to show what real estate was meant to be conveyed.

COSTS.—*Reversal on Assignment of Cross Errors.—Practice.*—Where the appellee assigns cross errors occurring prior to those assigned by the appellant, and all the errors assigned are found to exist, the judgment will be reversed at the costs of the appellant.

From the Fountain Circuit Court.

M. Milford, for appellants.

J. S. Nave, *B. F. Hegler* and *A. A. Rice*, for appellee.

MORRIS, C.—The appellee, James O. Reid, brought this suit against the appellants to foreclose a mortgage. The complaint is in two paragraphs.

The first states that Joseph Poole, in his lifetime, executed to the appellee a mortgage on lots three, four and five, in Butler's addition to the town (now city) of Attica, in Fountain county, Indiana, on the 21st day of September, 1877, to secure the payment of a note for $1,000, executed by said Poole to the appellee, and payable in two years from its date; that said mortgage was duly recorded in said county, within ten days from its execution; that on the —— day of March, 1878, said Joseph Poole died testate, leaving as his heirs, Lucretia A. Poole, Lizzie H. Poole and Julia G. Allen, formerly Poole, but since intermarried with David S. Allen; that Isaac E. Schoonover had been duly appointed administrator *de bonis non* with the will annexed of the estate of said Joseph Poole; that said note and the interest thereon were due and unpaid; that on the 5th day of November, 1877, said Poole executed another mortgage on said lots to the defendants George F. Ward and Isabella Whickcar to secure the payment of $5,600; that on the 22d day of December, 1877, Margaret Hushaw recovered a judgment in the Fountain Circuit Court against the said Joseph Poole for the sum of $600 and costs; that the appellee's lien is prior and superior to the others; that the appellants Samuel Carter, Newman Porter and Elizabeth V. Brown, and Frank M. Brown, her husband, have or pretend to have some interest in or title to said lots, but that the appellee is ignorant as to the character of such claim. All of the persons named as heirs, incumbrancers or as hav-

ing any interest in said lots, as well as the administrator of the estate of Joseph Poole, are made parties.

The second paragraph of the complaint is like the first, except that it states that the parties to the appellee's mortgage made a mistake in describing the addition to the town of Attica in which the lots mortgaged are situate; that the lots agreed and intended to be mortgaged are situate in Butler's addition of out-lots to the town of Attica; that there is no such addition to said town as Butler's addition, as stated by mistake in said mortgage. Prayer that the mortgage be reformed and foreclosed as reformed.

The cause was finally put at issue, and submitted to the court for trial. Upon the request of the appellants the court found the facts specially and the conclusions of law arising thereon. The appellant Newman C. Porter duly excepted to the conclusions of law found by the court. Judgment upon the findings for the appellee.

The error assigned by the appellant calls in question the conclusions of law as stated by the court.

The findings of the court are as follows:

"1. That on the 21st day of September, 1877, Joseph Poole executed the mortgage declared upon in plaintiff's complaint, which was duly recorded, as alleged therein; that the said mortgage was executed to secure the debt evidenced by the note described therein.

"2. That by mutual mistake of the parties the property intended to be covered by said mortgage was described as 'lots numbered three, four and five in Butler's addition to the town (now city) of Attica,' when it ought to have been described, and was, by the parties, intended to have been described, as 'lots numbered three, four and five in Butler's addition of out-lots to the town (now city) of Attica.'

"3. That there is a duly platted and recorded addition to the town (now city) of Attica, known and designated as Butler's addition of out-lots, and that there is not now, and

never was, any other addition to said town of the same or similar description made or recorded.

"4. That on the 5th day of November, 1877, the said Poole executed a mortgage upon said premises to secure the payment of $5,600 to the defendants George F. Ward and Isabella Whickcar; and that on the 22d day of November, 1877, the defendant Margaret Hushaw recovered a judgment in this court against Poole for $600.

"5. That on the 19th day of July, 1877, the said Poole executed a mortgage to Samuel Finney, as cashier of the First National Bank of Attica, and to Newman C. Porter, as security for the said Joseph Poole, upon the east half of the northwest quarter of section seven, township twenty-one north, of range seven west, containing $19\frac{55}{100}$ acres, more or less, to secure the payment of $1,000, which was duly recorded.

"6. That Butler's addition of out-lots to the town of Attica, was originally part of the 'east half of the northwest quarter of section seven, township twenty-one north, of range seven east,' and was added to said town before the 19th day of July, 1877.

"7. That said east half of the northwest quarter of section seven, township twenty-one north, of range seven east, prior to the 19th day of July, 1877, and on that day, consisted of several known and designated subdivisions, of which were Butler's said addition and $19\frac{55}{100}$ acres, known as the 'Coleman tract;' that each of these subdivisions were known, and since continuously known, to the parties hereto, as several and distinct parcels of land, and that at the time of the execution of the mortgage to Finney and Porter, it was the understanding and intention of the parties that the parcel of land to be covered by it was the 'Coleman tract.'

"8. That there is due to the plaintiff, upon the indebtedness secured by his mortgage, the sum of $1,307.50, and the further sum of $65, as and for his attorney fees.

"9. That Poole died upon the date alleged, and that an executor was appointed as alleged, and that the defendants

Lucretia A. Poole, Julia G. Allen and Lizzie Poole are his sole heirs and legatees.

"And upon the foregoing facts the court states the following as its conclusions of law:

"1st. That the plaintiff is entitled to have his mortgage reformed, and a decree of foreclosure thereof, and an order for the sale of the mortgaged property to satisfy his debt of $1,307.50, and the costs of this proceeding.

"2d. That the lien of the mortgage executed to the defendants Ward and Whickcar is junior to that of the plaintiff's mortgage.

"3d. That the mortgage executed to defendants Finney and Porter is not a lien upon the property described in the plaintiff's mortgage."

The appellant Porter alone excepted to the conclusions of law as stated by the court, and the only error complained of by him is, that the finding by the court, that the mortgage executed by Joseph Poole to him and Finney did not embrace the land intended to be mortgaged to the appellee, was not within the issues.

In the third paragraph of his answer to the appellee's complaint, the appellant Porter says that he holds a mortgage lien on the land described in the complaint, "prior in time and paramount in fact to the mortgage lien declared on in the complaint," to wit, a mortgage executed to him and another by Poole; that the debt secured by said mortgage remains unpaid and in full force. The debt is described, and a copy of the mortgage is made a part of this paragraph. The land is described in the mortgage as follows: "The east half of the northwest quarter of section seven, township twenty-one north, of range seven east, containing $19\frac{55}{100}$ acres, more or less, in Fountain county, Indiana." The prayer to this paragraph of the answer is, that the mortgage may be declared a lien superior to that of the appellee.

To this paragraph of the answer, the appellee demurred, on the ground that it did not state facts sufficient to constitute a de-

fence to the action. The demurrer was overruled and he excepted.

The appellee then replied to the third paragraph of the answer in six paragraphs, numbered 1, 5, 6, 7, 8, and 9. The first was a general denial; demurrers were sustained to the 5th, 6th, 7th and 9th paragraphs of the reply and overruled as to the 8th. The 8th paragraph of the reply stated that the mortgage executed by Poole to Finney and Porter was given to secure a debt of $1,000, which Poole owed the First National Bank of Attica, on which Porter was security; that Porter had taken possession of the mortgaged premises, caused the same to be sold, and that with the proceeds of the same he had paid the debt to the bank.

The appellant Porter objects, as we understand him, to that portion of the special finding of the court, which relates to and fixes the quantity of land embraced by the mortgage of Poole to Finney and him, as not being within the issues formed in the case, and that the conclusion of law based upon this portion of the finding is irrelevant and foreign to the issues.

The facts stated in the 3d paragraph of the answer certainly constitute no defence to the appellee's complaint. Though Finney and Porter held, as the answer alleges, a prior mortgage on the land embraced in the appellee's mortgage, still, the appellee was entitled to foreclosure of his mortgage.

But as the pleading sets out a copy of the mortgage and alleges that the appellant Porter is the holder of it, we think it may be treated, though called an answer, as a counterclaim, seeking to settle the priority of the appellant's lien. *Searle* v. *Whipperman*, 79 Ind. 424. And though it may be doubtful, as a general rule, whether one holding a prior lien, can, in an action by a junior mortgagee to foreclose, require such a question to be adjudicated, yet, when made a party to such suit by the holder of the junior mortgage for that very purpose, we think that the question may be regarded as properly presented for decision.

The 8th paragraph of the reply, which may be treated as

an answer to this counter-claim, alleges, in substance, payment, and nothing else. Under this pleading, no question as to the land embraced by the Finney and Porter mortgage could arise. Such a question would be altogether foreign to the issue.

The first paragraph of what is called the reply to the counter-claim is the general denial.

The counter-claim alleged that Porter held a mortgage on the land described in the appellee's complaint, prior and superior to that of the appellee. This the answer denied. Was it within this issue, to enquire and find, as the court did, that it was not the intention of the parties to mortgage the land actually described in it, but only a part of such land? that, by mistake of the parties a greater quantity of land was included in the mortgage than was intended to be embraced by it? We think such questions were not within the issue. The issue was not what land did the parties intend to mortgage, but what land had they in fact mortgaged. And this question could only be determined by the mortgage itself; that portion of the finding, therefore, which defines and describes the land which the parties intended to mortgage, and that portion of it which they did not intend to mortgage, is irrelevant and outside of the issue.

The description contained in the mortgage is, "The east half of the northwest quarter of section 7, town 21 north, of range 7 east, containing $19\frac{55}{100}$ acres, more or less."

The appellee insists that this description is ambiguous, and that it is, therefore, competent to accompany the mortgage with parol testimony to show that by the description is meant, not the east half of the northeast quarter of said section, but nineteen and fifty-five one hundredths acres, more or less, of undefined boundaries, situate somewhere within the east half of said quarter section. If we regard the words "nineteen and fifty-five hundredths acres, more or less," not as words of estimation, but as repugnant to the former words, they should be rejected, and then the description will be beyond criticism.

3 Washb. Real Prop. (4th ed.), 385, 402; *Gano* v. *Aldridge*, 27 Ind. 294. In the case of *Jackson* v. *Barringer*, 15 Johns. 471, it is held to be a well settled principle of law, "that when a piece of land is conveyed by metes and bounds, or any other certain description, this will control the quantity, although not correctly stated in the deed. The inference in such case is, that the intention was to convey the whole tract described; and the quantity of acres mentioned must yield to the more certain description." *Mann* v. *Pearson*, 2 Johns. 37; *Jackson* v. *Loomis*, 18 Johns. 81.

We conclude that the court erred in its conclusion of law that the mortgage executed to Finney and Porter was not a lien upon the land described in the complaint.

The appellee, among other cross errors assigned by him, says that the court below erred in sustaining the demurrer to sixth paragraph of his reply to the third paragraph of the answer of the appellant Porter. This pleading, called a reply, may, as we have stated, be treated as an answer to the counter-claim or cross complaint of Porter. It states that Poole intended to mortgage to Finney and Porter, and that they agreed and intended to accept and receive from Poole a mortgage on $19\frac{55}{100}$ acres of land only, being part of the said east half of the northwest quarter of said section seven, particularly describing the $19\frac{55}{100}$ acres intended to be mortgaged, and that it did not embrace the land described in said complaint; that, by the mutual mistake of all the parties, the particular description of the $19\frac{55}{100}$ acres was omitted in drawing said mortgage. The prayer is, that the lien of the Finney and Porter mortgage may be limited to the land intended to have been mortgaged, and that it be declared not to be a lien upon the land described in the appellee's complaint.

We think this answer good. If, as stated, none of the parties to the Porter and Finney mortgage intended to include in it the land mortgaged to the appellee, and it was included in said mortgage by the mutual mistake of all the parties, it should not be held to be a lien on the land unintentionally

and by mistake of the parties embraced in it, to the prejudice and injury of the appellee. We think the court erred in sustaining the demurrer to this paragraph of the answer to the cross complaint of Porter. As the first error was committed at the instance and in favor of the appellant, the judgment below should be reversed at his costs.

PER CURIAM.—It is ordered, upon the foregoing opinion, that the judgment below be reversed, at the costs of the appellant.

Opinion filed at the November term, 1881.

Petition for a rehearing overruled at the May term, 1882.

No. 9269.

HAGENBUCK ET AL. *v.* MCCLASKEY.

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126 695

REAL ESTATE, ACTION TO RECOVER.—*Title.—Possession.—Evidence.—Heir.—Presumption of Conveyance by Ancestor.*—In an action to recover the possession of real estate, the defendant in possession, unable to show title in himself, may protect his possession and defeat the action by proving facts and circumstances from which it may be fairly inferred that the ancestor, under whom the plaintiff claims as heir, had in his lifetime parted with the title to the land, so that the plaintiff inherited nothing therein.

DEMURRER TO EVIDENCE.—Where the plaintiff demurs to the evidence of the defendant, his own evidence can not be considered, and if, upon the evidence of the defendant alone, with every reasonable inference which might be drawn therefrom, a jury might rightfully find for the defendant, the demurrer should be overruled.

From the Starke Circuit Court.

W. E. Pinney, M. H. Weir and *W. B. Biddle*, for appellants.

T. J. Merrifield, for appellee.

BICKNELL, C. C.—This was an action to recover the possession of eighty acres of land and to quiet the title thereto.

The appellants were the plaintiffs; they claimed the land as the heirs of William Hagenbuck, who, as they alleged, died seized thereof in the year 1866.

The complaint and answer were in the common form.

The suit was commenced in the county of Porter, and the verdict there was for the defendant. The plaintiffs took a new trial under the statute, and the venue was changed to Starke county. The plaintiffs' title was a patent from the United States to Noah Newell, dated August 20th, 1838, a deed from Noah Newell to Daniel Meeker, dated April 20th, 1838, and a deed from Daniel Meeker and wife to William Hagenbuck, dated May 22d, 1838. These deeds were duly acknowledged. The only evidence of the plaintiffs, except said patent and deeds, was the deposition of Joseph Hagenbuck, one of the plaintiffs, a son of said William Hagenbuck, of Laporte county, who testified to the heirship of himself and his co-plaintiffs, and that he had lived in Laporte county thirty-five years, and had never heard his father make any claim to the land, and that he and his co-plaintiffs never paid any taxes on the land, that he knew of, and that he never knew he had any title to the land, until Weir and Biddle told him so, about a year before, and that the nature of the plaintiffs' title was, that, if the land was theirs, they wanted it; that he could not say whether his father had conveyed away the land or not, but that he believed, from what he had heard, that plaintiffs had a good title.

The defendant then introduced his evidence, and the plaintiff demurred thereto, as follows:

"And this being all the evidence given in this cause, the plaintiffs say that it is not sufficient for the defendant to maintain his defence, and the plaintiffs therefore demur to the defendant's evidence, and the plaintiffs pray that the defendant may be required to join in this demurrer, and the plaintiffs admit the said written evidence and all of the facts stated by the witnesses hereinbefore set out, and every inference and

conclusion the jury may rightfully and reasonably draw therefrom."

The defendant joined in said demurrer as follows:

"The defendant joins in this demurrer to the evidence of the defendant, and says that his evidence is sufficient in law to entitle him to maintain his defence to this action, and therefore he prays judgment."

The court overruled the demurrer to the evidence, and found for the defendant, and rendered judgment in defendant's favor. The plaintiffs appealed. They assign as error, overruling the demurrer to the defendant's evidence.

In *Schauber* v. *Jackson*, 2 Wendell, 13, it was held by the Court of Errors, of New York, that a defendant in ejectment, a naked possessor without claim of right, is entitled to have facts and circumstances submitted to a jury, from which a presumption may arise of a conveyance of the estate by the lessors of the plaintiff; so that if, in the judgment of the jury, such facts and circumstances are sufficient to warrant the inference of a conveyance, they may say so, and by thus showing the title out of the lessors of the plaintiff, a defendant may protect his possession, although he may be unable to trace such title to himself. Therefore, if, from the defendant's evidence in this case, a jury might rightfully and reasonably infer that William Hagenbuck, the ancestor of the plaintiffs, in his lifetime, after the conveyance of the land in controversy to him in 1838, parted with the title thereto, that would rebut the *prima facie* title of the plaintiffs, even if that evidence could be considered on such a demurrer; but this court has decided that in such a case the plaintiff's evidence can not be considered at all. *Fritz* v. *Clark*, 80 Ind. 591. Such evidence would protect the possession of the defendant by proving the title out of the plaintiffs, and a demurrer to it ought to be overruled. The evidence of the defendant, demurred to in this case, fully warrants the inference that said Hagenbuck, in his lifetime, did part with the title to the land in controversy. It appears that the land adjoins a public high-

way leading from Valparaiso to Hebron, and is about three miles from Valparaiso; that the appellee bought the land in 1855, from William Hanna, who gave him a warranty deed therefor; that he entered on the land in 1856, and that year cut timber, built a house and cleared and fenced twelve acres, and in the course of five years had the whole tract fenced, forty acres cleared and a new frame house built; also barn and cattle sheds.

The complaint was filed on the 12th day of October, 1875. If that date be taken as the commencement of the suit, the appellee had been in actual possession, claiming title and paying taxes, for about nineteen years. The evidence also shows that from 1838 to 1866, when he died, the said William Hagenbuck was living at Laporte, about twenty miles from the land, and tends to show that, for the last ten years of his life, he was in straitened circumstances, yet never claimed ownership of this land, or any part of it.

The evidence further shows that, in the year 1840, one Ridgeway held a note for $770.73, made by Gray, Bill & Co., payable to said William Hagenbuck, and by him endorsed to Ridgeway, and, that in that year, Ridgeway brought suit in the Laporte Circuit Court against said Gray, Bill & Co., and had an attachment issued therein, which was levied on the land in controversy, as the property of said Gray, and that, after the usual proceedings, said land was sold by the sheriff, as the property of said Gray, to the plaintiff, Ridgeway, who obtained a sheriff's deed therefor, dated September 13th, 1841.

It further appears, that Ridgeway and wife conveyed the land to the Cincinnati, Peru and Chicago Railroad Company by deed, dated November 21st, 1853, and that said company conveyed the same to William Hanna by deed, dated May 14th, 1855, and that William Hanna conveyed the same to the appellee by deed, dated November 2d, 1855, for the sum of $500.

The evidence also tends to show that when Gray, Bill &

Co. quit business, they sold out their stock of goods to Hagenbuck, but the witness, who testified as to such sale, stated that he did not know whether or not Hagenbuck paid for those goods in whole or in part by land; yet if the land was his, and was attached and sold as the property of Gray, in a suit upon a note of Gray's, on which he, Hagenbuck, was liable as endorser, his inaction is inexplicable. The evidence further shows that Hagenbuck was a petitioner in bankruptcy, in May 1842, and that his petition in bankruptcy, duly sworn to by him, on May 11th, 1842, contains the following statement: "The schedule, hereunto annexed and marked 'inventory of property,' and signed by your petitioner, contains a correct inventory of your petitioner's property, rights and credits of every name, kind and description, and the location and situation of each and every part and portion thereof, to the best of your petitioner's knowledge and belief." The inventory of property contains a minute statement and enumeration of articles of personal property, notes, judgments and accounts, and a house built on land of the petitioner's wife, but contains no statement whatever as to the land in controversy. The land was conveyed to Hagenbuck in 1838; it was sold under the attachment, as the property of Gray, in 1841, under the circumstances hereinbefore set forth; the petition in bankruptcy was equivalent to a statement under oath by the petitioner, that in 1842 he no longer owned the property—if he did then own it, he perjured himself. It can not be presumed that he committed perjury, merely because he had owned the property in 1838. The demurrer to the defendant's evidence admits every inference and conclusion that may be rightfully and reasonably drawn therefrom. That evidence fully warrants the inference, that Hagenbuck had parted with the title to the land in controversy, and that the plaintiffs inherited nothing in said land. There was no error, therefore, in overruling the demurrer to the evidence, and no error in rendering judgment for the defendant.

PER CURIAM.—It is therefore ordered, upon the foregoing opinion, that the judgment of the court below be and the same is hereby in all things affirmed, at the costs of the appellants.

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No. 8197.

STILZ ET AL. *v.* THE CITY OF INDIANAPOLIS ET AL.

TAXES.—*Assessment.*—The fact that real estate is assessed for taxation in the name of a person other than the owner, does not invalidate the assessment.

SAME.—*Cities and Towns.—Exemption of Property used for Agricultural Purposes.—Statute Construed.*—The act of March 13th, 1877, Acts 1877, Spec. Sess., p. 74, providing that city or town property used solely for agricultural purposes, etc., shall not be taxed for city or town purposes to any greater extent than lands in the township are taxed for township purposes, is not retrospective in its operation, and does not affect the assessment of such property for city purposes, previously made under existing statutes.

SAME.—*Injunction.*—An injunction will not be granted to enjoin the collection of taxes if any of the taxes assessed are valid and remain unpaid.

SAME.—*City.—Power to Assess Taxes for Payment of Interest.*—A city has power to tax all property within its limits subject to state and county taxation for the payment of interest upon its public debt, and property may be taxed for this purpose which has been annexed to the city after the creation of the debt.

From the Marion Circuit Court.

C. H. Test, J. Coburn and *E. Bassett*, for appellants.

J. A. Henry, for appellees.

NEWCOMB, C.—This was an action against the city of Indianapolis and the treasurer of said city, to enjoin a tax sale of real estate.

The first paragraph of the complaint alleged that the plaintiff Anna Maria Stilz was the owner for life, and the other plaintiffs, her children, owners in fee, of forty acres of land within the corporate limits of said city; that said lands had

not been platted nor dedicated in any way to corporate purposes, but were wholly used for agricultural purposes; that said lands were assessed for city taxation at $50,000, and that the city of Indianapolis had assessed and levied taxes thereon for the years 1876 and 1877, for general city purposes, aggregating, with penalties, interest and costs, the sum of $1,530.32; that said lands had been so assessed at a greater per cent. on their value than lands were taxed in the same township outside of said city for township purposes; that no lands in said township, outside of the city, had been taxed at a greater percentage on their appraised value than twenty cents on each one hundred dollars for the year 1876, and thirty-three cents on each one hundred dollars for the year 1877; that said lands were not liable for city taxes for the year 1876 greater than the sum of $120, which, with costs, interest and penalty, made a sum not exceeding $140, and for the year 1877 a sum not over $170, amounting in all to $310, which sum the plaintiffs were ready to pay, and then tendered the same in court. The complaint further denied the validity of the tax assessments of both years, on the ground that said land had been listed and assessed in the name of J. George Stilz, who was not the owner thereof, and had not been listed or assessed in the names of the plaintiffs. It was also averred that the plaintiffs had presented their petition and remonstrance to the common council of said city, and requested that said lands be taxed as provided for in the act approved March 13th, 1877; but the council refused to take any action on said petition, and had caused said lands to be advertised for sale by the treasurer of said city, as delinquent lands, to make the amount of said illegal taxes, penalties, interest and costs.

Prayer for an injunction to prevent and restrain the defendants from further proceeding to collect said taxes, or to sell said land for the payment thereof; that the defendants be required to accept the sum so tendered, or so much thereof as might be found due, in full payment and discharge of all taxes

due said city on said lands, for the years 1876 and 1877, and for all other proper relief.

The second paragraph stated that said lands were annexed to said city by an ordinance passed on the —— day of April, 1876, and against the consent and protest of the plaintiffs; that said lands then and still were used exclusively for agricultural purposes, and had not been platted into lots, etc.; that at the date of said annexation said city was indebted in the sum of $2,000,000, and that, of the city taxes assessed against said lands, $500 was levied and assessed for the purpose and with the intent to apply that sum towards the payment of principal and interest of said debt; that said indebtedness had been incurred before the annexation of plaintiffs' land, and that they had not and would not derive any benefit therefrom.

The prayer of this paragraph was, that an account might be taken of the indebtedness of said city, and the rate of interest thereon, for a discovery as to what portion of the taxes so assessed upon the land of the plaintiffs was assessed and levied to pay said debt and interest; that the defendants be forever enjoined from making any assessment or levy of a tax to be applied, in any form, manner or mode to the payment of any debt of said city existing at the time of the passage of said ordinance of annexation.

On the filing of the complaint, a restraining order was granted against the threatened sale. Subsequently, the defendants appeared and filed separate demurrers to each paragraph of the complaint. The demurrers were sustained, the restraining order dissolved, and final judgment was rendered on the demurrers against the plaintiffs.

The first paragraph alleges two grounds against the validity of the taxes in question: First, that the land was listed and assessed in the name of a person who was not the owner; secondly, that the land was liable to be taxed as agricultural lands only, for both the years 1876 and 1877.

On the first point we are referred to several decisions of the courts of sister states, sustaining the position of the plain-

tiffs; but they are not authority with us on this question, for the reason that, under our statutes, an error of this sort is at most an irregularity, and does not vitiate the assessment. In section 102 of the tax law of December 21st, 1872, it is provided, "That no assessment of real property shall be considered as illegal by reason of the same not being listed or assessed in the name of the owner or owners thereof." 1 R. S. 1876, p. 97. And by section 230, p. 125, it is further provided, that "The sale of lands for taxes shall not be invalid, on account of such lands having been listed or charged on the duplicate in any other name than that of the rightful owner." These sections dispose of the first objection. See also *Mullikin* v. *Reeves*, 71 Ind. 281; *Noble* v. *City of Indianapolis*, 16 Ind. 506. Irregularities in the assessment, which do not render it illegal and void, are not sufficient to maintain an injunction. *City of Delphi* v. *Bowen*, 61 Ind. 29.

The act of 1872, from which we have quoted, was, by the act of March 11th, 1875, 1 R. S. 1876, p. 338, the law governing the assessment of city taxes in this case.

On the second proposition the argument of the plaintiffs is, that the act of March 13th, 1877, Acts 1877, Spec. Sess., p. 74, operated as a repeal of pre-existing statutes, by which all real estate within the city limits was taxed uniformly, and that although the taxes of 1876 were levied under the laws then in force, the effect of the act of 1877 was to reduce the taxes of 1876 to the rate per cent. prescribed thereby. In other words, that the act of 1877 was retroactive in its operation, and invalidated the taxes levied in 1876, except as to the percentage leviable for township purposes upon lands in the township and outside of the city.

We quote the first section of that act, which is the only one material to the question: "*Be it enacted* * * * That lands, not platted as city or town property, used solely for agricultural purposes, or are wholly unimproved, and lying within the limits of any city or town of this State, when such lands have not been in any way dedicated for corporation

purposes, shall not be listed or taxed for general city or town purposes, to any greater percentage on the appraised value than lands in the townships outside of the corporation are taxed for township purposes."

It is a rule of interpretation that statutes must be construed prospectively, unless they clearly import a different intention on the part of the Legislature. *Aurora, etc., Turnpike Co.* v. *Holthouse*, 7 Ind. 59; *Hopkins* v. *Jones*, 22 Ind. 310; *Flinn* v. *Parsons*, 60 Ind. 573.

We fail to discover any intention on the part of the Legislature to make the act of 1877 retrospective in its operation. On the contrary we think the manifest intent was that it should be prospective. It provides that the class of lands named shall not be listed or assessed beyond a certain rate on their value. This was evidently intended as a rule for the future listing and assessment of such lands, and can not, without doing violence to the language used, be applied to past transactions, for as to them there was neither listing nor assessing to be done.

This act left unimpaired the legal machinery for the collection of taxes, and did not purport to, nor did it, in our opinion, disturb levies previously made in conformity to law.

It follows that the court correctly sustained the demurrer to the first paragraph of the complaint. The alleged tender was for too small a sum. No cause is shown in this paragraph why the whole of the taxes of 1876 should not have been paid, and the plaintiffs were not entitled to an injunction without a payment or tender of so much of the taxes as were shown to be due. *Roseberry* v. *Huff*, 27 Ind. 12; *Board of Commissioners, etc.*, v. *Elston*, 32 Ind. 27; *Brown* v. *Herron*, 59 Ind. 61; *City of South Bend* v. *The University of Notre Dame*, 69 Ind. 344.

Counsel for the appellants do not cite any authority in support of the theory of the second paragraph of the complaint, that annexed lands can not be taxed by the city to raise means for the payment of corporate debts existing at the date of the

annexation; and, in view of the statute regulating city taxation, the theory is untenable. Taxes can be levied by virtue of statutory authority, and not otherwise. The general power of the city to tax property is found in the 58th section of the act for the incorporation of cities, 1 R. S. 1876, p. 297, which declares that the common council shall have power to levy and cause to be assessed and collected in each year an *ad valorem* tax of not more than one per centum on *all* property subject to State and county taxation within such city; and that there may also be levied and collected annually an additional tax to pay the interest on the public debt owing by such city.

The only reasonable construction of the powers thus given is, that all property in the city, subject to State and county taxation, except where a different provision is made by statute, must be taxed at a uniform rate for general city purposes, and for the payment of interest on the public debt of the city. Where there is no specific provision in the statute for the payment of the principal of the debt, it is necessarily chargeable on the general revenue of the city.

The circuit court did not err in sustaining the demurrer to the second paragraph of the complaint, and its judgment ought to be affirmed.

PER CURIAM.—It is therefore ordered, on the foregoing opinion, that the judgment below be and it is hereby in all things affirmed, at the costs of the appellants.

ON PETITION FOR A REHEARING.

BEST, C.—The appellants file a petition for a rehearing, and in support of it insist, first, that the act of March 13th, 1877, mentioned in the principal opinion, repealed by implication the act of 1872, under which the taxes of 1876 were assessed; second, that the city has no power to assess any taxes upon the land in the complaint mentioned, to pay any portion of the debts of the city contracted before the appellants' land was annexed to the city; and, third, that the taxes

of 1877 were assessed in pursuance of the act of 1872, after the act of 1877 went into force.

We adhere to the decision of the first question as announced in the main opinion, and this conclusion necessarily determines the others against the appellants. As the assessment of 1876 was, for aught that is averred, a valid assessment, and was not paid at the commencement of this suit, it follows that the appellants were not entitled to an injunction, though the city was not authorized to assess any taxes upon the land for the payment of debts incurred before the land was annexed, and though the taxes of 1877 were erroneously assessed. *Brown* v. *Herron*, 59 Ind. 61; *City of South Bend* v. *University of Notre Dame*, 69 Ind. 344; *Mesker* v. *Koch*, 76 Ind. 68.

An injunction can not be granted if any of the taxes assessed are legal and remain unpaid. The petition should be overruled.

PER CURIAM.—The petition is overruled.

No. 8811.

WILLISON *v.* BINFORD, ADMINISTRATOR.

SUPREME COURT.—*Practice.*—*Second Appeal.*—Where a judgment has been reversed and the cause remanded to the court below, and from the proceedings there had a second appeal is taken, such appeal brings before the Supreme Court, for review and decision, nothing but the proceedings subsequent to the reversal; and none of the questions presented and decided on the first appeal can be re-heard or re-examined on the second appeal.

PROMISSORY NOTE.—*Mortgage on Real Estate.*—*Suit by Assignee against Indorser.*—*Due Diligence.*—*Insolvency of Maker.*—*Defences.*—Under section 5504, R. S. 1881, the assignee of promissory notes, not payable to order or bearer in a bank in this State, and secured by mortgage on real estate, having used due diligence in the premises, or where, by reason of the insolvency of the maker of the notes, due diligence would have been unavailing, may have his action against his immediate or any remote in-

dorser of the notes, for any balance due or to become due thereon after the sale of the mortgaged premises; and it is no defence to such action that the mortgaged premises depreciated in value between the time when the assignee might have enforced, and the time when he did enforce, the sale of said premises.

SAME—*Assignor's Contract.—Sale of Mortgaged Premises.—Application of Proceeds.*—The contract of the assignor or indorser of a promissory note, negotiable under the statute of this State, but not governed by the law merchant, is a warranty that the maker is liable on the note and able to pay it. Upon the sale of mortgaged premises, the proceeds of the sale shall be applied, under section 639 of the civil code of 1852 (sec. 1104, R. S. 1881), first to the payment of the principal due, interest and costs, and then to the residue secured by the mortgage and not due; and an answer of the assignor, seeking a different application of the proceeds of sale from that prescribed in the statute, is bad on demurrer for the want of facts.

SAME.—*Want of Diligence.—Notes not Due.*—The assignee's failure to use due diligence in the prosecution of his judgment against the maker upon the notes then due, is no defence in the suit against the assignor upon the notes which afterwards became due.

SAME.—*Assignment of Mortgage Notes.—Judgment of Foreclosure.—Merger.*—In the judgment recovered by the assignee of notes secured by mortgage, against the maker thereof, for the foreclosure of the mortgage, there is no merger of the assignor's contract of assignment.

From the Montgomery Circuit Court.

G. W. Paul, J. E. Humphries, S. C. Willson, L. B. Willson, J. E. McDonald and *J. M. Butler*, for appellant.

A. D. Thomas, C. L. Thomas, P. S. Kennedy and *W. T. Brush*, for appellee.

HOWK, J.—This is the second time this cause has been before this court. The opinion and judgment of the court, on the first appeal, are reported under the title of *Binford, Adm'r, v. Willson*, 65 Ind. 70.

It appears from the record that, on March 10th, 1870, one Cornelius Blair executed ten promissory notes, of that date, each in the sum of $230, payable respectively in one, two, three, four, five, six, seven, eight, nine and ten years after date, to the order of the appellant Willson, and secured by mortgage on real estate. These notes were endorsed by the appellant to the appellee's intestate. When the first four of

the notes had become due and were unpaid, in a suit for that purpose, the appellee obtained judgment thereon, and for the foreclosure of said mortgage. Subsequently, the mortgaged premises were sold by the sheriff, under an order of sale issued on said judgment, for a sum less than the amount adjudged to be due on the first four notes, and the proceeds of said sale were applied to the payment of the first four notes, and leaving the last six notes, and each of them wholly unpaid.

On the 9th day of April, 1877, the fifth, sixth and seventh of said notes being then past due, the appellee commenced this suit against the appellant, as the assignor of said three notes, in a complaint of three paragraphs. In each paragraph he counted upon the appellant's assignment by endorsement of a separate note. The appellant's demurrer to appellee's complaint, for the alleged insufficiency of the facts therein to constitute a cause of action, was sustained by the court, and judgment was rendered accordingly. From this judgment the first appeal was prosecuted; and the only question then presented for the decision of this court was the sufficiency of appellee's complaint. Upon this question, the court then said:

"The complaint did not aver that execution had been issued and returned 'no property found' on the amounts, severally, which it was found in the decree of foreclosure would become due at stated periods (see 2 R. S. 1876, pp. 263, 264, secs. 635, 636, 637 and 639; *Skelton* v. *Ward*, 51 Ind. 46); but it did aver the utter insolvency of the maker of the notes at, before and after such stated periods or times, as an excuse for not causing such issues of execution, etc. This was sufficient. *Reynolds* v. *Jones*, 19 Ind. 123; *Roberts* v. *Masters*, 40 Ind. 461; *Markel* v. *Evans*, 47 Ind. 326." *Binford* v. *Willson*, *supra*. The judgment was reversed, and the cause was remanded, with instructions to overrule the demurrer to the complaint.

After the cause was remanded, on the 25th day of November, 1879, the appellee filed a supplemental complaint, in three paragraphs, in which he declared separately upon the appellant's assignments by endorsement of the last three notes, maturing respectively in eight, nine and ten years after date. The cause was then put at issue, and tried by the court, and a finding was made for the appellee, assessing his damages in the amount found due on said several notes. Over the appellant's motion for a new trial, and his exception saved, the court rendered judgment upon and in accordance with its finding.

In this court, the appellant has assigned, as errors, the decisions of the trial court, in overruling his demurrer to the original complaint, and in sustaining the appellee's demurrers to the second, third, fourth and fifth paragraphs of his answer, and in overruling his motion for a new trial.

On the former appeal of this cause, as we have seen, the original complaint was fully considered by this court, and held to be sufficient. The question as to the sufficiency of the original complaint can not, therefore, be regarded as an open one, and we must decline to give it any further consideration. *Dodge* v. *Gaylord*, 53 Ind. 365; *Test* v. *Larsh*, 76 Ind. 452.

In the second paragraph of his answer, the appellant alleged in substance, that when the first note secured by the mortgage became due, on March 10th, 1871, the fair cash value of the mortgaged premises was $3,000, and that the said premises were then an abundant security for the payment of all the ten notes and interest thereon; that if appellee's intestate had used proper diligence and foreclosed said mortgage at the first term of court after the first note became due as aforesaid, as she might have done, and sold the mortgaged premises, she would have realized therefrom, and had paid to her, the entire debt evidenced by the ten notes specified in said mortgage, and the interest thereon; that, instead of so doing, the appellee's intestate did not commence suit for the collection of said debt

and interest, until in April, 1874, and did not bring the mortgaged premises to sale until in July, 1874; that in the mean time, the mortgaged premises depreciated in value in the sum of $1,500, and that by means of the delay, laches and want of diligence of the appellee's intestate, the appellant was injured and had sustained damages in the sum of $2,000, which he set up, by way of counter-claim, against any sum that might be found due from him, as the assignor of the notes in the complaint mentioned.

The court committed no error, we think, in sustaining the appellee's demurrer to this paragraph of answer. It is true, that, under the code, the holder of a mortgage may proceed to foreclose the same whenever any part of the mortgage debt, or any interest thereon, is due and unpaid. It is true, also, that if the holder by endorsement of the mortgage debt, not payable to order or bearer in a bank in this State, would have his action against his immediate or any remote endorser, for the balance due, or to become due, on the mortgage, which may remain unsatisfied after the sale of the mortgaged premises, he must have used due diligence in the premises, or he must show that such diligence would have been unavailing. But we know of no rule of law, and the appellant's counsel have referred us to none, which would render the assignee of the mortgage debt liable in damages to the assignor, for the mere depreciation in value of the mortgaged premises, between the time when the assignee might have enforced the sale of said premises, and the time when he did enforce such sale. The appellant did not allege that the mortgaged premises were depreciated in value by any act of appellee's intestate, or that such depreciation was, or even might have been, foreseen or anticipated by said intestate. Indeed, it seems to us, that the appellant has alleged no fact, in the second paragraph of his answer, which constitutes any defence to appellee's action.

In the third paragraph of his answer, the appellant alleged

in substance, that by the laches and want of diligence of appellee's intestate, in commencing suit for the foreclosure of said mortgage, and in bringing the mortgaged premises to sale, until in July, 1874, the appellant was released and discharged from liability, as the assignor thereof, on the first four of the said notes maturing on and before March 10th, 1874, and on the interest then due on all said notes, amounting in the aggregate, of principal and interest, to the sum of $1,980; that at the date of the sale of the mortgaged premises, there only remained due, for principal and interest, on all of said notes, for which the appellant could, in any event, be made liable as such assignor, the sum of $1,380 with the interest thereon from March 10th, 1874, until the day of said sale in July, 1874; that, between the time when the mortgage might have been foreclosed, and the date at which it was foreclosed, the mortgaged premises depreciated in value to the amount of $1,500; and the appellee and his intestate knew all the time that said property was depreciating in value and being damaged by said waste, and took no steps to foreclose said mortgage or stop such waste, and the mortgage debt was drawing ten per cent. interest during all that time; that the appellee bid in the mortgaged premises at and for $1,500, and made by levy and sale of the property of said Cornelius Blair, other than the mortgaged premises, the sum of $106, making an aggregate sum of $1,606, which the appellee applied on said first four notes, but which sum, the appellant claimed, should have been applied first in discharge of his liability as such assignor.

The theory of this paragraph of answer, as we understand its allegations, is that the appellant, by his endorsement of the several notes described in the complaint, became liable thereon to appellee's intestate, as the qualified or conditional surety of the maker of said notes; that, by her failure to use "due diligence in the premises" as to each of the first four

notes, the appellee's intestate discharged and released the appellant from any liability to her, on each and all of the said first four notes; and that the appellant, as such surety, was entitled to have the proceeds of the sale of the mortgaged premises applied first to the payment of the last six notes, on which he remained liable as such surety, before any part of such proceeds should be applied on the first four notes, from which he had been released by the failure of appellee's intestate to use "due diligence in the premises." The contract of an assignor of a note, negotiable under the statute of this State but not governed by the law merchant, is a warranty that the maker is liable on the note and able to pay it. *Black* v. *Dunoan*, 60 Ind. 522, on page 532; *Ward* v. *Haggard*, 75 Ind. 381. In section 4 of the act of March 11th, 1861, concerning promissory notes, etc., it is provided that the assignee of such a note, having used due diligence in the premises, shall have his action against his immediate or any remote endorser thereof. 1 R. S. 1876, p. 636; section 5504, R. S. 1881. So, where the maker of the note is insolvent, and no part of the debt could have been made, if judgment had been recovered and execution issued thereon with due diligence, the assignee may have his action against his immediate or any remote endorser of the note, whether he has used due diligence in the premises or not. *Hubler* v. *Taylor*, 20 Ind. 446; *Markel* v. *Evans*, *supra*.

It seems to us, however, that the theory of this third paragraph of answer is in direct contravention of the provisions of section 639 of the code of 1852, which section controls the application of the proceeds of the sale of mortgaged premises, in such a case as the one stated in said paragraph. This section provides, that "If the mortgaged premises can not be sold in parcels, the court shall order the whole to be sold, and the proceeds of the sale shall be applied, first to the payment of the principal due, interest and costs, and then to the residue secured by the mortgage, and not due." Section

721, code of 1881; section 1104, R. S. 1881. Under these statutory provisions, the proceeds of the sale of the mortgaged premises were properly applied to the payment of the portion of the mortgage debt then due, and could not have been applied otherwise. We are of the opinion, therefore, that appellee's demurrer to the third paragraph of answer was correctly sustained.

In the fourth paragraph of his answer, the appellant alleged that the appellee had delayed the issue of any execution on the judgment rendered on the first four notes, for the space of forty-five days; and that for this want of due diligence in the premises, on the appellee's part, the appellant was discharged from liability as assignor of the six notes which were not then due. This question was presented by the appellant, on the first appeal of this cause, and the court then said: "On this point, he is clearly in error. That negligence only discharged him from liability, as assignor upon the notes then due, and the collection of which that negligence might affect. But that negligence could not affect the collection of the notes not then due." It follows, therefore, that the court did not err in sustaining the appellee's demurrer to the fourth paragraph of answer.

The appellant alleged, in the fifth paragraph of his answer, that the notes described in appellee's complaint were merged in the judgment against said Blair. We need not argue for the purpose of showing that this paragraph of answer did not constitute any defence to appellee's action. Certainly, there was no merger of the appellee's causes of action against the appellant, as the assignor of the notes, in the judgment rendered against the maker thereof, in an action wherein the appellant was not a party.

The only causes for a new trial, properly assigned in the motion therefor, were that the finding of the court was not sustained by sufficient evidence, and that it was contrary to law. The evidence is not in the record; and, therefore, we

can not say that the court erred in overruling the motion for a new trial.

The judgment is affirmed, with costs.

NOTE.—The appellant having died since the submission of the case, the judgment of this court will be rendered as of the November term, 1880, the date of such submission.

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No. 8292.

HUDSON v. EVANS ET AL.

MARRIED WOMAN.—*Conveyance.—Inchoate Interest in Land of Husband.—Statute Construed.—Judicial Sale.*—A wife's inchoate interest in real estate is not a present interest which can be transferred, but only a contingent right, which will be barred or extinguished by her joining in a deed of conveyance with the husband; and when she has joined in such conveyance, the act of March 11th, 1875, section 2508, R. S. 1881, can not apply to a subsequent judicial sale, though under a judgment rendered against the husband before the conveyance was made.

SAME.—*Cases Distinguished.*—A. and wife conveyed land of A. to P., who conveyed the same to E. By virtue of an execution upon a judgment against A., the land was afterwards duly sold and conveyed by the sheriff to H.

Held, in an action by H. to recover possession of the land, that the act of 1875, concerning the wife's inchoate right, did not apply, and that the wife of E. had no interest in the land under said act. *Ketcham* v. *Schickedanz*, 73 Ind. 137, and *Mark* v. *Murphy*, 76 Ind. 534, distinguished.

From the Boone Circuit Court.

C. S. Wesner, for appellant.

F. M. Charlton, for appellee.

WOODS, J.—Complaint by the appellant, in the usual form, for the recovery of possession of real estate. Besides the general denial, the defendants Marcus and Margaret Evans filed a special plea, under which they claimed to be the owners of the undivided one-third of the land as tenants in common

with the plaintiff, and as such entitled to possession. The case was submitted to the court for trial, the evidence consisting of an agreed statement of facts, substantially the same as are alleged in the special plea, that is to say, as follows:

On the 3d day of February, 1877, Elias Evans, being the owner of the land described in the complaint, subject to the lien of a judgment against him, conveyed the same, his wife joining in the deed, to one Edmund Powell, who, with his wife, conveyed the same to the said Marcus Evans. Afterwards, by virtue of an execution issued upon the judgment against Elias Evans, the land was levied upon and duly sold by the sheriff to the appellant, who at the end of the year from the date of the sale, there having been no redemption, received the sheriff's deed.

The appellees claim that the law of March 11th, 1875, Acts 1875, p. 178, applies, and that by virtue of the conveyances aforesaid, the inchoate interest of the wife of Elias Evans was transferred to the defendant Marcus, and, upon the consummation of the sheriff's sale, became a vested right.

It is not alleged in the special plea, nor stated in the agreement of facts, that the wife of Elias Evans was still in life at the time the sheriff's sale was made, but, laying no stress upon this, we are of opinion that the case does not come within the act referred to. That act, which has in a number of instances recently come under consideration, has received an interpretation much broader than its literal terms, but there is no case to warrant the application now contended for. The language of the 1st section, which alone is material to the question, is: "That in all cases of judicial sales of real property, in which any married woman has an inchoate interest by virtue of her marriage, where the inchoate interest is not directed by the judgment to be sold or barred by virtue of such sale, such interest shall become absolute and vest in the wife in the same manner and to the same extent as such inchoate interest of a married woman now becomes absolute upon the death of the husband, whenever, by virtue of said sale, the legal title of

the husband in and to such real property shall become absolute and vested in the purchaser thereof," etc.

The following is the argument made on behalf of the appellees:

"Can the appellant acquire greater rights by reason of the judgment debtor's wife having conveyed her inchoate interest before the sheriff's sale than he would have had if such interest had never been conveyed? Then the judgment from its incipiency could only have been a lien on the husband's rights in the real estate, and never did attach as against the wife's inchoate interest, which would have materialized upon the sale by the sheriff. It may be that such one-third interest did not come into existence until the sale occurred; and, even if it did not, under a well known rule of law, the grantee is entitled to all subsequently acquired title of the grantors, either immediate or remote."

The fallacy consists in an apparent misapprehension of the nature of a wife's inchoate interest and of the effect of her joining the husband in a deed of conveyance. Her right is not a present interest in the land. It is a right of which she can not be deprived against her will, and which she can not herself relinquish except by joining her husband in the execution of a deed of conveyance; but yet her interest is only an inchoate possibility, contingent, in all cases, except for the law of 1875, upon her outliving the husband. It is not in and by itself a transferable interest (*McCormick* v. *Hunter*, 50 Ind. 186), and constitutes no diminution of the husband's present estate nor of his power to convey to another. Her joining in the conveyance does not transfer an estate beyond that which would be conveyed by the deed of the husband alone; it simply bars the contingency upon which, but for her joining in the conveyance, she might become possessed of a vested interest.

The law of 1875 makes this modification only: It does not change or affect the present character of the wife's interest,

nor change the mode of barring it by joining in the husband's deed, nor diminish the complete estate of the husband, but, instead of leaving the inchoate right contingent in all cases upon the wife's outliving the husband, provides that in "cases of judicial sales of real property in which" she "*has* an inchoate interest by virtue of her marriage," "such interest shall become absolute and 'vest" in her, etc., when the title of the husband shall become absolute and vested in the purchaser at such sale.

It follows that the conveyance of the land by Elias Evans and his wife to Powell did not transfer, but extinguished, her inchoate right; or, perhaps to speak more accurately, it barred the possibility of the right becoming an absolute vested one, upon the contingency either of survivorship or of a judicial sale of the property.

This conclusion is not inconsistent with the decision in *Mark* v. *Murphy*, 76 Ind. 534. In that case it was held that a mechanic's lien, arising out of a contract with the husband, did not reach or affect the wife's inchoate interest, and that after a judicial sale and conveyance of the land upon a foreclosure of such lien, the wife's interest became absolute and vested, and subject to sale upon a mortgage executed by her and her husband, after the attachment of the mechanic's lien but before the sale of the land on the foreclosure thereof.

The case is distinguishable from the one in hand in this, if in nothing else, that the mortgage did not, under the rule now prevalent, convey away the title of the husband, but constituted only a lien upon the land, and her joining in the execution of the mortgage did not bar or extinguish her inchoate interest, but simply subjected it to the lien of the mortgage in such manner as that it was liable to be barred by a foreclosure, sale and conveyance under the mortgage. It estopped her from claiming any right arising out of her inchoate interest as against the mortgagee. The land having been sold and conveyed, by virtue of the mechanic's lien, before foreclosure had been had of the mortgage, her inchoate

interest which she had held, subject to the mortgage, then became an absolute vested right, though still subject to the mortgage, in the execution of which she had joined.

The sale under the judgment, in the case before us, corresponds strictly enough to the sale under the mechanic's lien in that case; but the difference between the cases is, that when the sale under the judgment was made, Mrs. Evans, by joining her husband in a conveyance of the land, had absolutely relinquished and barred her inchoate interest; so that, under the most liberal interpretation, the law of 1875 was not applicable to the case.

The case of *Ketchum* v. *Schicketanz*, 73 Ind. 137, is a strong one, but affords no support to the judgment of the circuit court.

Judgment reversed, with costs, and the cause remanded with instructions to grant a new trial and to sustain the demurrers to the second paragraph of the joint answer of the appellees, and to the first paragraph of the separate answer of Marcus Evans.

No. 10,267.

James v. The State.

From the Monroe Circuit Court.

J. R. East and *W. H. East*, for appellant.

D. P. Baldwin, Attorney General, *H. C. Duncan*, Prosecuting Attorney, and *W. P. Rogers*, for the State.

Woods, J.—The appellant was adjudged to pay a fine of five dollars for selling, without license, intoxicating liquor in a quantity less than a quart. The disputed point in the case is whether there is sufficient evidence to show that the transaction, on which the prosecution was predicated, was a sale, the appellant contending that it was a gift.

Our judgment is that the finding is supported by sufficient evidence; sufficient, at least, under the rules applicable to the consideration of questions of fact by this court.

Judgment affirmed, with costs.

In Memoriam.

On the 26th day of May, 1882, the following memorials in regard to the death of the HON. HORATIO C. NEWCOMB, who died at Indianapolis, Indiana, on May 23d, 1882, were presented to the Supreme Court of Indiana:

"The surviving members of the Supreme Court Commission beg leave to present to the court, the following memorial of their late distinguished associate, the HON. HORATIO C. NEWCOMB:

"His public life and services are too well known and appreciated to need any mention here. Appointed a member of our commission in April, 1881, he had been with us less than a year, when compelled by declining health to abandon our meetings, but in that brief time he had won our affection by his genial and kindly nature, and had secured our entire admiration and respect by his ability as a lawyer and a judge. He was a remarkably sound, clear-headed, sagacious man; we shall miss his valuable aid in the discharge of our duties; we shall miss his attractive companionship. We mourn his loss, but we remember that he died in the midst of his usefulness, an honor to his profession and to this court. We ask that this tribute to his memory be placed upon the record of the court.

"GEORGE A. BICKNELL, C. C.
"JOHN MORRIS,
"WILLIAM M. FRANKLIN,
"JAMES I. BEST."

Memorial of the Indianapolis Bar Association, presented by HONS. J. W. GORDON, L. HOWLAND, O. B. HORD and A. C. HARRIS, committee, and address of Judge B. K. ELLIOTT:

"HORATIO COOLEY NEWCOMB was born at Wellsboro, Pa., on December 20th, 1821, and died at Indianapolis, Ind., on May 23d, 1882. He commenced the study of the law in 1841, and was admitted to the bar of the Supreme Court of this State

in 1844. He commenced the practice of his profession in the town of Vernon, but in 1846 he removed to Indianapolis, and entered into partnership with Ovid Butler, one of the most successful lawyers of that day in central Indiana. Since 1846, with the exception of a few years in which his talent for general politics and his vigorous pen led him into the editorial chair of the Indianapolis Journal, his life has been spent at the bar, on the bench, or in some responsible official position. For five years he was one of the judges of the Superior Court of Marion county, and, after retiring from that bench, he resumed, so far as his health permitted, the practice of the law, and continued it until, in 1881, he was appointed one of the Commissioners of the Supreme Court, which position he held at his death.

"Judge NEWCOMB was a man of clear mind, great industry and perfect integrity. His grasp of a question, while perhaps slower than that of some of more than ordinary brilliancy of perception, was firm, comprehensive and just. The whole position, with all its lights and shades, would open before him as a result not alone of his mental power, but of his unflagging industry as well. The subject of his thought was taken up, not to be laid down until mastered and a conclusion reached. His honesty of mind and his moral principles were such that he never shrank from a conclusion because it was distasteful or unexpected. A conviction became with him a motive.

"As a lawyer, he was candid with his client, laborious and untiring in his client's cause, honest with the court, and successful beyond the average of the bar.

"As a judge, he carried to the bench all the industry which distinguished him in his legal practice, and a ripened intellect, a clear judgment of the human motives, an impartiality which could never be doubted, and a knowledge of affairs without which a judge must always fail in the estimation of the profession. His conduct toward the bar was of a nature which the natural justice of his character could not fail to produce. Courteous to every one, careful not to give unnecessary offence, he sought to preserve the rights of all suitors as things not to be disposed of in whim or irritation.

"In legislative affairs he was noted for the same personal characteristics. While the opponents of the party to which he was attached might dispute the policy he favored, his vigor, his tact, his honesty of purpose, his true patriotism never were questioned.

"As a citizen, his life was quiet and adorned with the virtues of the Christian character. Domestic in his tastes and

habits, he was the center of an affectionate family group, and abounded in personal friendships.

"By his death the State has lost a faithful public servant, the bench a just judge, the bar an honest man, and his family a devoted husband and father.

"JOSHUA G. ADAMS, F. RAND,
"W. A. KETCHAM, W. Q. GRESHAM,
"C. C. HINES, JOHN MORRIS."

Remarks of Judge ELLIOTT on presenting the memorial to the Bar Association of Indianapolis:

"MR. CHAIRMAN—For more than thirty years HORATIO C. NEWCOMB occupied a high place in the affections and confidence of our people. Confidence was never more worthily bestowed. Entrusted with many public offices, he was faithful in all. A purer public and private life than his no man ever lived. It is spotless in its spiritual purity. His earnest, strong nature made him sometimes a fierce political combatant, and involved him in hot and angry controversies, but yet against his integrity and honor no word was ever uttered. The bitterness of partisan strife did not attack his integrity; that passed unchallenged, because impregnable. His opponents never questioned his motives, however much they condemned his judgment. Judge NEWCOMB was a man of strong convictions. He was for the right, as the right seemed to him, with all the intense earnestness of a great soul. When he had deliberately reached a judgment, whether in matters of religion, politics or law, he adhered to it with unyielding firmness. And yet, so admirable were his qualities of mind and heart, he was neither a fanatic nor a bigot. Firm in adhering to his own conception of right, his enlightened and charitable mind made him careful of the rights of others. His own judgment he obeyed, that of others he respected. He was modest, yet not timid. He was courageous in the avowal of his opinions, and bold in maintaining them. He was an aggressive debater on the hustings, in the legislative halls, and in the forum. Of his own merits and powers he was not sufficiently appreciative; he rated them far below their value. Had he been more of an egotist, he would, I believe, have attained a much higher position than he did; but, after all, there was a noble simplicity in his character that was greater honor than any office could have conferred.

"In his friendships, Judge NEWCOMB was warm and sincere. He made new friends less readily than many, but he never lost any old ones. Many have been more demonstra-

tive in their friendship than he, few more constant and sincere. He was slow to make friends, but strong to keep them. His manner was, I am told, somewhat cold and distant. I can not recollect that it ever seemed so to me. If it ever did, long years of close friendship and intercourse have driven the impression from my mind. For these many years he has seemed to me, what in truth he was, a man of keen sensibilities, of warm emotions and affectionate nature. He was tender and kind, although sometimes stern and almost harsh. He heartily hated a wicked act, and as heartily believed in vigorously punishing the evil-doer. Dishonesty and shuffling in business, in politics or in judicial proceedings aroused his indignation and produced a storm of invective that was almost terrible. Yet he was not a hard man; there was really not a bit of flint in his nature. His sympathies were easily aroused. He was as tender-hearted as a woman, and the suffering and distressed found in him a benefactor and a friend.

"Judge NEWCOMB'S mind was powerful and massive. It was solid, not brilliant; but still there were rich veins of humor which oftentimes made his mental productions snap and sparkle. His perceptive faculties were unusually strong and vigorous. His mental vision was penetrating and far-seeing. He saw through the crust to the substance, and he saw not one side, but all sides. His intellectual grasp was broad and strong; it took up many things, took strong hold of them, and retained them until they were examined from many sides. This great analytical power enabled him to arrange and adjust the different parts of an involved and difficult question so that it could be readily understood and fully mastered. He was too intensely in earnest to care much for the graces of oratory. It must, indeed, be owned that a lack or, perhaps, defect of imagination prevented him from ever becoming, in the highest sense, an orator or an advocate. If he never attained great eloquence, he always spoke well, and with the strength of a logician. If he was not brilliant, he was solid. If he did not charm by the graces of his style, he always talked common sense. He never mistook the false for the true eloquence. Like all earnest men he hated shams. A sham was a sham to him whether in advocacy or elsewhere.

"HORATIO C. NEWCOMB possessed in an eminent degree the qualities of a great judge. Above all things else was his sterling honesty. He loved fair play. No suitor ever received less than that at his hands. He was singularly free from passion or prejudice. His judicial judgments were the products of an unbiased mind; nothing warped it. He gave to

every case a full and impartial consideration; no influence turned him from the path of duty. It often seemed to me that such was the character of his mind, and such his habits of thought, that he could not have turned aside if he would. His was a trained legal mind. His logic was severe. His premises were assumed only after careful investigation, and, once established, his conclusions were inevitable. It was a well stored mind. Its stores were not of cases, but of principles. His opinions are models of pure, clean and vigorous judicial style. They are not wanting in elegance, and they are rich in pure idiomatic English.

"The hand that penned these opinions will write no more. The great Judge, in whose decrees there is never error, pronounced the judgment which has taken from us our brother and our friend. We feel sure that at the bar of that last Grand Assize our brother will appear without fear, for through all the years of his life

"He has kept
The whiteness of his soul."

Upon the presentation of the memorials, it was ordered by the Court, that they be spread upon the record; and, as they are so full and just that nothing remains to be added, they are accepted as the expression of the court's appreciation of the noble life and character of Judge NEWCOMB, and of the sincere sorrow of its members for the great loss sustained by his death.

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2. *Construction of Statutes.—Legislative Power.—Supreme Court.*—The legislative authority of the State is vested in the General Assembly, whose power is supreme and sovereign, and is subject to no restrictions except such as are imposed by the State and Federal constitutions, and the laws and treaties made by and under the Federal Government; and, in considering the constitutionality of an act of the General Assembly, it is the uniform rule of the Supreme Court to construe and interpret its provisions, if it can be done, in such manner as to sustain and not defeat the law in question. *McComas* v. *Krug*, *327*

3. *Same.—Impeachment or Removal of Public Officers.—Voluntary or Habitual Intoxication.*—Sections 7 and 8, of article 6, of the State constitution, should be construed together, and, thus construed, they authorize the General Assembly to provide by law for the impeachment or removal from office of county, township or town officers, for crime, incapacity or negligence. Therefore, the act of March 11th, 1875 (section 6012, R. S. 1881), providing for the removal from office of any public officer, for voluntary intoxication in the business hours of his office, or for habitual intoxication, is not repugnant to, or in conflict with, any provision of the constitution, State or Federal, and is a constitutional and valid law. *Ib.*

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1. *Offer of Sale and Acceptance by Letter.—Parol Evidence.*—In an action for the price of a horse alleged to have been sold by the plaintiff to the defendant, the plaintiff, admitting that he had sent a letter to the defendant containing an offer to sell him the horse for two hundred dollars, offered in evidence a letter, afterwards received from and signed by the defendant, of the tenor following: "I might purchase your horse at $200—the price you asked. I would like to get it at once, if it will do me, which I am quite certain it will. Please reply at once."

Held, that the two letters do not show a complete written contract for the sale of the horse, and that the one offered was competent evidence, in connection with other parol evidence offered, to show the sale charged. *Stagg* v. *Compton*, *171*

2. *Statute of Frauds.—False Representations.—Partnership.*—An oral representation by persons in partnership, falsely and fraudulently made, that each of them had $800 invested in the business, whereby another was induced to invest that sum, and become a member of the copartnership, whereas none of them had any sum so invested, is not within the statute of frauds. R. S. 1881, section 4909. Such representation is one concerning the credit or solvency of another. *St. John* v. *Hendrickson*, *350*

3. *Same.—Fraud.—Ratification.—Rescission.—Damages.*—Where one is induced by fraud, in the form of false representations, to enter into a

contract, and afterwards, upon obtaining full knowledge of the fraud practiced upon him, and of all material facts, declines to repudiate it, and expressly ratifies it, he can neither rescind nor maintain an action for damages. *Ib.*

4. *Warranty, Breach of.—Pleading.* —A complaint for a breach of warranty of a machine to be "fit for cutting wheat and grass, and that it will do first-class work," alleging for breach, generally, that "it was not fit for and would not do first-class work," and was worthless to the plaintiff, is not sufficient on demurrer. The nature and particulars of the breach should be specified, and it should be shown that the machine was properly tested within a reasonable time, by alleging the facts constituting the test and the time thereof. *Johnston, etc., Co. v. Bartley, 406*

5. *Same.—Oral and Written Warranty.—Evidence.—Presumption.*—Where, upon a complaint for breach of an oral contract of warranty, it appears in evidence that the contract was in the first place oral, but finally reduced to writing, there can be no recovery, the preceding oral negotiations being presumed to be merged in the written instrument. *Ib.*

6. *Pleading.—Condition Precedent.*—In pleading the performance of a contract, the statute (R. S. 1881, section 370) makes it sufficient to aver that the party has performed all the conditions on his part.
Bertelson v. Bower, 518

7. *Same.—Sale of Personal Property.—Title.*—A contract, whereby A. agrees to buy all the spring lambs of B. at certain prices to be paid, the seller to pasture them till called for, passes title to the purchaser without specifically setting the property apart, and, if without fault of the seller, it suffers injury, the loss falls upon the purchaser. *Ib.*

CONTRIBUTORY NEGLIGENCE.

See NEGLIGENCE, 3 to 7.

CONVERSION.

See CHATTEL MORTGAGE, 3, 4; JUSTICE OF THE PEACE, 5.

CONVEYANCE.

See CITY, 2; EVIDENCE, 4, 8, 9; FRAUDULENT CONVEYANCE; MARRIED WOMAN, 2 to 4; MORTGAGE, 1, 2; REAL ESTATE, ACTION TO RECOVER, 6; SHERIFF'S SALE, 4, 5; TAXES, 13; VENDOR AND PURCHASER, 3 to 5; VOLUNTARY ASSIGNMENT.

COPY.

See ARBITRATION AND AWARD, 2; COUNTY ORDER, 3; JUSTICE OF THE PEACE, 3; PROMISSORY NOTE, 16; TURNPIKE COMPANY, 2.

CORPORATIONS.

See CITY; CRIMINAL LAW, 17, 18; INSURANCE, 10 to 13; NEGLIGENCE; RAILROADS; TOWNSHIP; TOWNSHIP TRUSTEE, 8; TURNPIKE COMPANY.

1. *Pleading.—Complaint.*—In the complaint of a corporation, the pleader is not required to allege every fact necessary to its original organization, or anticipate supposed defences growing out of irregularities occurring in or after the election of directors.
Washer v. Allensville, etc., T. P. Co., 78

2. *Same.—Books of Corporation.—Evidence.*—The books of a corporation are competent evidence for and against its members in an action between the corporation and its members. *Ib.*

3. *Information.—Quo Warranto.*—An information under the third clause of section 1131, R. S. 1881, is sufficient if it appear therefrom that the defendants pretend to be organized as a corporation, and are exercising corporate powers, when they are not so organized as the law requires.
State, ex rel., v. Beck, 500

4. *Same.*—Whether corporators intend, in good faith, to carry out the purposes of their organization, can not be questioned by *quo warranto*. *Ib.*

5. *Railroad Company.—Liability for Wilful Acts and Torts of Agents and Servants.—Principal and Agent.—Ratification.*—A corporation is liable for the wilful acts and torts of its agents, done to the injury of others, within the general scope of their employment, though the particular acts have not been previously authorized and have not been ratified since by the corporation. *Terre Haute, etc., R. R. Co.* v. *Jackson*, 19

COSTS.

See ARBITRATION AND AWARD, 3; ATTACHMENT, 8; COUNTY CLERK, 5; CRIMINAL LAW, 16; FRAUDULENT CONVEYANCE, 2; NEW TRIAL, 4; SUPREME COURT, 25.

1. *Taxation.—Judgment Conclusive.—Supreme Court.*—The Supreme Court will not look into the merits of a cause to determine whether costs are properly taxed, but will regard the verdict and judgment as conclusive upon such question against the unsuccessful party. *Williams* v. *Williams*, 113

2. *Same.—Decedent's Insolvent Estate.—Claimant's Action on Administrator's Bond.*—A claimant against a decedent's insolvent estate, having received a part of her claim, and failing, in an action on the administrator's bond, to recover more, may not complain of the overruling of her motion to tax against her adversaries the costs from the commencement of the action until the last payment to her. *Ib.*

COUNTER-CLAIM.

See MORTGAGE, 5 to 7; PLEADING, 12.

COUNTY AUDITOR.

See EVIDENCE, 4; TAXES, 13.

1. *Relator.—Capacity to Sue.—County Treasurer.—Defalcation.—County Commissioners.*—A county auditor may sue a defaulting county treasurer individually, in the name of the State, on his relation as such auditor, for trust funds, and for State, county, school, road, railroad, corporation and other taxes, if so directed by the board of commissioners of the county *Gauntt* v. *State, ex rel.*, 137

2. *Same.—Referee.—Finding.—Trust Funds.—Taxes.—Exceptions.—Practice.*—In a suit by the State on the relation of a county auditor, against a county treasurer, for trust funds, and by order of the board of county commissioners for taxes not accounted for, a report of the referee finding the facts, and his conclusions of law, which finds a gross sum due from such treasurer, a failure to find that the board ordered the suit is not reached by exceptions to the conclusions of law, nor would the defendant, on that account, be entitled to judgment on the report. *Ib.*

COUNTY CLERK.

See PRINCIPAL AND AGENT, 3; SHERIFF, 2; SUPREME COURT, 19.

1. *Official Bond.—Complaint.*—As to the sufficiency on demurrer of the complaint on the bond of a county clerk, to recover for fines, docket and witness fees collected by him, see opinion. *Carr* v. *State, ex rel.*, 342

2. *Same.—Docket and Witness Fees.—Fines and Forfeitures.—Attorney General.—Prosecuting Attorney.—Statute Construed.*—It is the duty of the clerk—R. S. 1881, section 5858—to pay docket fees to the treasurer within thirty days after collection; also on the first of January, annually, all fines, jury fees, and witness fees not claimed for a year; also the proceeds of sales of real estate of unknown heirs—section 2412; also, when after the lapse of two years from final settlement of an estate, heirs do not claim the surplus, and the court directs the pay-

ment—section 2415; and on default the Attorney General may, at once, under section 5668, sue for the same; but for default as to fines and forfeitures, and for property escheating to or belonging to the State, he has no duty to perform until a year has elapsed from the time the cause of action has accrued, and then only if the prosecuting attorney has failed, neglected, or refused to collect or begin suit *Ib.*

3. *Same.—Repeal of Statute by Implication.—Statute Construed.*—Section 5668, R. S. 1881, is not so inconsistent with sections 4435, 5611 and 5616, or either of them, as to repeal them. *Ib.*

4. *Same.—Statute of Limitations.—Principal and Surety.*—In a suit against the county clerk and his sureties, on his bond, it is error to sustain a demurrer to an answer by the clerk, that the cause of action did not accrue within three years, and the error can not be regarded as harmless because there was a similar defence pleaded by the sureties in another paragraph, nor because the judgment against the clerk was no larger than against the sureties; nor can the suit be regarded as upon the bond against the sureties, and against the clerk as not upon the bond, so as to make the period of limitation, as to him, six years, as provided in section 293, R. S. 1881. *Ib.*

5. *Same.—Payment After Suit.—Evidence.—Costs.—Semble*, that a county clerk, pending a suit on his bond, may pay, as he ought before suit, to the proper officer, and, under proper issues, proof of such payment is admissible; but this would not affect the plaintiff's right to costs and penalties. *Ib.*

COUNTY COMMISSIONERS.

See COUNTY AUDITOR, 2; COUNTY ORDERS, 2; DRAINAGE; RAILROAD, 5, 6.

COUNTY ORDERS.

1. *Promissory Note.—Consideration.—Presumption.*—A county order for taxes refunded containing the words "due and payable June 30th, 1878, with 8 per cent. interest from date," is in legal effect the promissory note of the county, is assignable, and is presumed to be upon a sufficient consideration. *Brownlee* v. *Board, etc., 186*

2. *Same.—Refunding Taxes Paid on School Lands.—Act of February 8th, 1877.—Pleading.*—In an action against a board of commissioners upon an order for the repayment of taxes paid on school lands, if the taxes were of the class which the act of February 8th, 1877, Acts 1877, p. 139, prohibits from being refunded, and that fact does not appear on the face of the complaint, it must be pleaded as a defence to the action. *Ib.*

3. *Evidence.—Set-Off.—Answer.—Exhibit.*—A county order is admissible in evidence in support of a set-off for it, where the answer of set-off so identifies it by date and number, and amount of principal and interest, that the opposite party can not be misled. *Highfill* v. *Monk, 203*

COUNTY TREASURER.

See COUNTY AUDITOR.

COURTS.

See CIRCUIT COURTS; CONSTITUTIONAL LAW, 4.

COVENANTS.

See INSURANCE, 8.

CRIMINAL LAW.

See JUSTICE OF THE PEACE, 1; LIQUOR LAW.

1. *Ticket-Scalper.—Special Railroad Tickets.—Statute Construed.*—Section 8 of the act of March 9th, 1875, regulating the issuing and taking up of railroad tickets, etc., 1 R. S. 1876, p. 259, exempts from the operation

of its provisions all special tickets, whether half-fare or excursion tickets, or special in any other respect. *State* v. *Fry*, 7

2. *Same.*—A railroad ticket, having stamped upon its face the word "special," is *prima facie* exempt from the provisions of said act. *Ib.*

3. *Gift Enterprise.—Definition.—Judicial Notice.—Supreme Court.*—The Supreme Court takes judicial notice that the phrase "gift enterprise," used in sections 2077 and 2078, R. S. 1881 (Acts 1881, pp. 211, 212), means substantially a scheme for the division or distribution of certain articles of property, to be determined by chance, amongst those who have taken shares in the scheme. *Lohman* v. *State*, 15

4. *Same.—Advertising.—Information.—Duplicity.*—An information, charging that the defendant advertised an account of when and where a certain gift enterprise was to be drawn, the prizes therein, the price of a ticket, and showing where tickets might be obtained, and had at the same time given publicity to said gift enterprise by unlawfully circulating printed copies of such account, does not charge two separate and distinct offences under section 172, R. S. 1881, sec. 2078. *Ib.*

5. *Same.—Price of Ticket.—Equivalent Terms.*—Announcing in the published account, set out in such information, how much money invested in a specified manner would procure a ticket, is equivalent to stating the price of the ticket. *Ib.*

6. *Same.—Time or Place of Drawing.—Notice.*—The announcement in such published account: "To every purchaser of twenty-five cents worth of goods at our drug store we will give a ticket; this ticket entitles the holder to one share in the donation to be held December 10th, 1882," is sufficient to name the time or place of the contemplated drawing. *Ib.*

7. *Same.—Signatures to Published Account.*—In such publication, it was immaterial whether any, and, if any, whose name was signed to the published account of the scheme. *Ib.*

8. *Constable.—Taking Recognizance.—Statute Construed.*—Fixing the amount of a recognizance in cases of felony, is a judicial act which a constable has no authority to perform; nor does section 1705, R. S. 1881, confer upon him authority to take recognizances in such cases without a judicial order fixing the amount, or directing that bail may be taken; and a bond so taken, without such order, is void, and subsequent acts of the court can not validate it, nor is it such a defect as is cured by section 1221. *State* v. *Winninger*, 51

9. *Perjury.—Sufficiency of Indictment.*—Under the criminal code, section 1747, R. S. 1881, it is only necessary, in an indictment for perjury, to set forth the substance of the controversy or the matter in respect to which the crime was committed, and in what court or before whom the oath alleged to be false was taken, and that the court or person before whom it was taken had authority to administer it, with the proper averments to falsify the matter whereof the perjury is assigned, without setting forth any part of the record or proceeding, or the commission or authority of the court or other authority before which the perjury was committed. *Burk* v. *State*, 128

10. *Same.—Materiality of Testimony.*—It must appear, though it need not be alleged in express terms, in an indictment for perjury, that the testimony given, and alleged to be false, was touching a matter material to the point in question. *Ib.*

11. *Pleading.—Former Acquittal.—Jeopardy.*—A plea of former acquittal is sufficient, if it shows that the defendant had been indicted, tried and acquitted, in a court of competent jurisdiction, for the same felony charged in the indictment in the pending case; for the fundamental

law forbids, that a person charged with crime be put in jeopardy twice for the same offence. *Ib.*

12. *Affidavit and Information.—Statute Construed.—Witnesses.*—Section 1670, clause 5, R. S. 1881, construed in connection with sections 1671 and 1756, does not imperatively require the names of the witnesses to be stated in the body of the affidavit on which an information is based; and it is error to quash it for the omission to do so. *State v. Bennett, 315*

13. *Continuance.—Evidence.*—Where a fact not constituting the body of the offence, but a circumstance tending to prove guilt, is to be put in evidence by the prosecution, and the defendant learns the intention of the State too late to procure evidence which will explain the fact, it is error to overrule his motion, on proper affidavit, to postpone the trial so as to give him the opportunity. *Kennedy v. State, 579*

14. *Same.—Affidavit of Absent Witness.*—The affidavit of the absent witness need not be made a part of the application for a continuance. *Ib.*

15. *Same.—Burglary.—Ownership.—Indictment.—Landlord and Tenant.*—Where the building alleged to have been burglariously entered is in the possession of a lessee or tenant, it may properly be charged to be his property, or that of the landlord, sec. 1753, R. S. 1881. *Ib.*

16. *Reserved Question of Law.—Practice.—Supreme Court.—Appeal Sustained.—No Reversal of Judgment.—Costs.*—During the prosecution of a criminal cause, the prosecuting attorney may, by bill of exceptions, under section 1846, R. S. 1881, reserve any point of law for the decision of the Supreme Court. And, if the defendant be acquitted, the prosecuting attorney may, within one year, take the reserved case to the Supreme Court, upon appeal; there shall be no reversal of the judgment, on such appeal, but the opinion of the Supreme Court shall be the uniform rule of decision in inferior courts, and if the decision below is held to be erroneous, the appellee must pay the costs of appeal.
State v. Tuney, 559

17. *Same.—Foreign Insurance Company.—Certificate of Auditor of State.—Duty of Agent.*—Under section 3765, R. S. 1881, a foreign insurance company is not required to file, in the county clerk's office, a certificate of the auditor of State showing that it is authorized to do business in the county, but it is made the duty of any agent of any such company, who assumes to act as such agent in the transaction of insurance business in any county, to procure and file in the office of the clerk of the circuit court of the county a certificate from the auditor of State, showing that he is authorized to act as such agent in the transaction of insurance business, for such company, in such county. *Ib.*

18. *Same.—Embezzlement by Agent.—Illegal Consideration or Premiums.—Defence.*—Where an agent of a foreign insurance company is prosecuted for the embezzlement of the moneys of the company received by him, in the course of his agency, as embezzlement is defined in section 1944, R. S. 1881, it is no defence that such agent had not complied with the requirements of section 3765, R. S. 1881, in regard to his agency, and had therefore received such moneys for the company, upon an illegal consideration and in the transaction of an unlawful business. *Ib.*

19. *Sabbath Desecration.—Indictment.—Sale.—Evidence.*—In a prosecution for desecration of the Sabbath, under section 96, Acts 1881, p. 194, R. S. 1881, section 2000, the indictment alleged that the defendant, on the 4th day of December, 1881, unlawfully engaged in common labor, and his usual vocation, by selling cigars.

Held, that the indictment was insufficient for failing to allege that the sale was on some day known and commonly called Sunday.

Held, also, that proof must be made of the sale on some particular Sunday

within a time not barred by the statute of limitation of six months, section 1594, R. S. 1881. *Gilbert* v. *State*, 565

CROPS.

See EMBLEMENTS; SHERIFF'S SALE, 18, 19.

CROSS COMPLAINT.

See PARTITION.

CUSTOM.

See INSURANCE, 7.

DAMAGES.

See CHATTEL MORTGAGE, 4; CONTRACT, 3; FRAUD; GUARDIAN AND WARD, 8; INJUNCTION BOND; NEW TRIAL, 7; TOWNSHIP; TRESPASS, 2.

DECEDENTS' ESTATES.

See COSTS; EVIDENCE, 1 to 3.

1. *Claims.—Principal and Surety.*—Prior to the statute of 1881 (R. S. 1881, section 2311), an ordinary suit might be brought against a principal debtor, and the administrator of his surety; and if the principal was not served with process, the suit might go on against the administrator alone, unless objection was made by motion before pleading. *Corbaley* v. *State, ex rel.*, 63

2. *Widow's Rights Under Section 28 of Statute of Descents.—Growing Wheat.*—A widow, occupying land for the year after the death of her husband, under section 2492, R. S. 1881, is entitled to the husband's share of wheat planted on the land by a tenant before the husband's death, which ripened and was harvested during such year. *Jones* v. *Jones*, 232

3. *Claim.—Pleading.—Promissory Note.—Consideration.—Supreme Court.*—The testator executed to the appellee a paper as follows: "July 5th, 1870. When I am gone, for value received, I promise my grandchild, Sarah E. Roll, to pay her or order five hundred dollars, with interest from date ten per cent. Jonas Williams. Lucy, this is due to Sis, when I am done with it—is for staying with you. Jonas Williams."

Held, that this, with the affidavit required, was a sufficient complaint upon a claim against an estate.

Held, also, that the instrument, duly proved, sufficiently established a consideration for its execution, so that the Supreme Court would not disturb an allowance upon it. *Hathaway* v. *Roll*, 567

DECLARATIONS.

See PRINCIPAL AND AGENT, 1; RAILROAD, 3.

DEED.

See CITY, 2; EVIDENCE, 4, 8, 9; MARRIED WOMAN, 2 to 4; MORTGAGE, 1, 2; PLEADING, 4; SHERIFF'S SALE, 21; STATUTE OF FRAUDS; TAXES, 6, 13; VENDOR AND PURCHASER, 3, 4; VOLUNTARY ASSIGNMENT.

DEFALCATION.

See COUNTY AUDITOR; TOWNSHIP TRUSTEE, 4 to 7.

DEFAULT.

See REVIEW OF JUDGMENT, 1.

DEFECTS CURED BY VERDICT.

See PLEADING, 7; PRACTICE, 13; VERDICT, 4.

DEMAND.

See INSANITY, 3; INSURANCE, 2; PROMISSORY NOTE, 4.

DEMURRER.

See Assignment of Error, 1; Judgment, 1; Pleading, 3, 8; Practice, 14 to 17; Promissory Note, 8; Township Trustee, 3.

DEMURRER TO EVIDENCE.

See Insurance, 7.

1. *Practice.*—A demurrer to the evidence admits all facts which the evidence tends to prove, and all such inferences as can be reasonably drawn therefrom, but forced and unreasonable inferences are not admitted. *Willcuts* v. *Northwestern, etc., Ins. Co.*, *300*
2. *Same.—Effect of.*—The effect of a demurrer to the evidence is to concede the truth of all the facts of which there is any evidence against the demurring party, and to prevent him from insisting upon the benefit of evidence in his favor, if there is a conflict in the evidence. *Ib.*
3. *Same.*—Where the plaintiff demurs to the evidence of the defendant, his own evidence can not be considered, and if, upon the evidence of the defendant alone, with every reasonable inference which might be drawn therefrom, a jury might rightfully find for the defendant, the demurrer should be overruled. *Hagenbuch* v. *McClaskey*, *577*

DEPARTURE.

See Sheriff's Sale, 2.

DESCENTS.

See Decedents' Estates, 2; Real Estate, Action to Recover, 6; Will, 7.

DESCRIPTION.

See City; Drainage, 2; Evidence, 8, 9; Mortgage, 6, 7; Real Estate, Action to Recover, 1; Sheriff's Sale, 17; Statute of Frauds; Taxes, 1 2, 3, 5; Turnpike Company, 3.

DESCRIPTIO PERSONÆ.

See Promissory Note, 15.

DILIGENCE.

See Execution, 1; Promissory Note, 17 to 20.

DISAFFIRMANCE.

See Insanity, 2, 3.

DISMISSAL.

See Supreme Court, 1, 10, 13.

DITCHES AND DRAINS.

See Drainage.

DIVORCE.

1. *Alimony.—Supreme Court.*—The Supreme Court will not disturb an allowance for alimony, unless there has been an abuse of discretion by the trial court. *Buckles* v. *Buckles*, *169*
2. *Alimony.—Attorney's Fees.—Antenuptial Contract.—Supreme Court.*—Where at marriage the wife is 33 and the husband 77 years of age, and there was an antenuptial contract concerning property, containing a release of all share in the husband's estate upon his death, and it appeared that the husband had made provision for the wife beyond the requirements of the contract, an allowance to the wife of $25 for attorney's fees, and a refusal to allow alimony, will not be disturbed by the Supreme Court. *Corey* v. *Corey*, *469*

DOCKET WRIT.

See County Clerk, 2.

DRAINAGE.

1. *Board of Commissioners.—Appeal to Circuit Court.*—Under the provisions of section 1 of the act of March 13th, 1879, to enable the owners of wet lands to drain or reclaim them, etc., the proceedings of the board of commissioners of the county, in the cases therein provided for, were judicial and not discretionary; and from all decisions of such commissioners, in such cases, any person aggrieved thereby might appeal to the circuit court of the proper county. *Bryan* v. *Moore*, 9

2. *Same.—Uncertainty of Petition.—Description.—Motion in Arrest.*—An objection to the petition for a ditch or drain, on the ground of vagueness or uncertainty in the description of the route of such ditch or drain, can not be reached by a motion in arrest of judgment, but only by a motion to make such description more certain and specific. *Ib.*

3. *Same.—Judgment of Circuit Court.—Mandate to County Board.—Practice.*—In such a proceeding, it was competent for the circuit court, on an appeal thereto, under the provisions of section 5778, R. S. 1881, to send the proceeding down to the county board, with an order how to proceed, and to require such board to comply with the final determination of such court in the premises. *Ib.*

DUPLICITY.

See Criminal Law, 4, 5; Pleading, 8.

EJECTMENT.

See Real Estate, Action to Recover; Sheriff's Sale, 13, 15, 20; Taxes, 12.

ELECTIONS.

Contested Election — Quo Warranto.—Jurisdiction.—Statute Construed.—The right to an office may be contested and tried upon information filed in the circuit court, under sections 749 and 750, 2 R. S. 1876, pp. 298 and 299, notwithstanding the special statutory provisions for the contest of elections. *State, ex rel.*, v. *Gallagher*, 558

EMBEZZLEMENT.

See Criminal Law, 18.

EMBLEMENTS.

See Decedents' Estates, 2.

Sheriff's Sale.—Redemption.—Landlord and Tenant.—Crops.—The law favors the right of one who sows to reap, but, if he knows he can not reap before the expiration of his right of possession, he sows at his peril; so, where an execution defendant remains in possession of real estate sold on execution during the year for redemption and puts in a crop which will not mature until after the year expires, and he fails to redeem he is not entitled to such crops. *Thomas* v. *Noel*, 382

EMPLOYER AND EMPLOYEE.

See Negligence, 1.

ENDORSER AND ENDORSEE.

See Promissory Note, 17 to 20.

ESTOPPEL.

See Specific Performance, 3; Township Trustee, 4; Turnpike Company, 6.

EVICTION.

See VENDOR AND PURCHASER, 3.

EVIDENCE.

See ARBITRATION AND AWARD, 3; BILL OF EXCEPTIONS, 4; CHATTEL MORTGAGE, 5; CITY; CONTRACT, 1, 5; CORPORATIONS, 2; COUNTY CLERK, 5; COUNTY ORDER, 3; CRIMINAL LAW, 10, 13, 19; EXECUTION, 2; GUARDIAN AND WARD, 5; INJUNCTION BOND, 1; INSURANCE, 2; JUSTICE OF THE PEACE, 5; LIQUOR LAW; NEGLIGENCE, 6; NEW TRIAL, 3, 4; PRACTICE, 2, 6, 7, 9, 10, 14; PRINCIPAL AND AGENT, 1; PROMISSORY NOTE, 1, 13; RAILROAD, 3, 4, 6, 8; REAL ESTATE, ACTION TO RECOVER, 6; SHERIFF'S SALE, 12, 20, 21; SUPREME COURT, 4 to 6, 11, 12, 17, 20, 22, 23; TAXES, 5, 12, 13; TURNPIKE COMPANY, 2; WILL, 3, 4.

1. *Witnesses.—Heirs.—Statement of Party.*—On trial of an action against heirs, founded on a contract with the ancestor, to obtain title to real property, a party incompetent under section 499, R. S. 1881, to testify, can not call from a witness his own statements of fact made to the witness before and during examination. *Cottrell* v. *Cottrell*, 87

2. *Same.*—What may not be given in evidence directly, can not be given indirectly. *Ib.*

3. *Same.—Conversation.*—A party who is an incompetent witness to give in evidence a conversation with a deceased person, can not give it in evidence as rehearsed by him to another. *Ib.*

4. *Tax Title.—Auditor's Deed.*—An auditor's deed upon a tax sale, put in evidence by the defendant (who sought to show title in himself), failed to recite that the owner of the land was without personal property out of which the taxes could have been collected. Without other proof, or any assurance of an intention to make such proof, it is not error to reject such a deed, offered in evidence, to the defendant from the purchaser for taxes. *Woolen* v. *Rockafeller*, 308

5. *Foreign Statutes.—Authentication.*—A statute of another State, authenticated as required by the act of Congress, R. S. 1881, sec. 464, is admissible in evidence, though the authentication be not in conformity with the statute of this State, R. S. 1881, sec. 457. *Ansley* v. *Meikle*, 360

6. *Record.—Bill of Exceptions.*—As evidence, a record of court is an entire thing, and all proper parts of it are to go in evidence if any of it be admitted; but this does not include bills of exceptions and other papers incidentally connected with the proceedings.
State, ex rel., v. *Hawkins*, 486

7. *Same.—Objection.—Practice.*—An objection to reading a record in evidence raises no question as to the reading of a bill of exceptions connected with the same proceedings, and filed therein. *Ib.*

8. *Deed.—Description.*—Proof in explanation, that the words in a deed "north part of" a lot meant the "north half" of it, is inadmissible, where it is not shown that the words have a peculiar or technical meaning. *Langohr* v. *Smith*, 495

9. *Same.*—When real estate is conveyed by metes and bounds or any other certain description, this will control the quantity, although not correctly stated in the conveyance, and parol evidence is not admissible to show what real estate was meant to be conveyed.
Porter v. *Reid*, 569

EXCEPTIONS.

See ARBITRATION AND AWARD, 1; BILL OF EXCEPTIONS; COUNTY AUDITOR, 2; PRACTICE, 4 to 6, 11; REFEREE; SUPREME COURT, 3.

EXECUTION.

See APPEAL; FRAUDULENT CONVEYANCE, 2; MARRIED WOMAN; SHERIFF; SHERIFF'S SALE; VENDOR AND PURCHASER, 5.

1. *Exemption.—Diligence.*—Exemption of property from sale on execution is a right to be asserted at the time and in the manner provided by law, and by a person showing himself within the statute creating it, or it is lost. *Boesker* v. *Pickett*, 554
2. *Same.—Action for Possession.—Evidence.*—In an action against an officer for property claimed as exempt, evidence that a schedule containing a description of the property was presented to him and a demand made to set it apart, and his return showing its seizure, make a *prima facie* case. *Ib.*
3. *Same.—Offering Different Schedules.*—Whether one claiming exemption has offered schedules not containing the property claimed in the last, is a question of fact for the court or jury trying the issue, and at most he has the burden of explaining his acts. *Ib.*
4. *Same.—Sale and Rescission.—Fraud.—Supreme Court.*—That property claimed as exempt has been sold and regained by a rescission, does not deprive the owner of his privilege, and where the sale is found by the trial court to have been without fraud and rescinded the Supreme Court can not say that its finding was not fully supported by the evidence. *Ib.*
5. *Same.—Allegation of Value.*—An allegation, that "Said property does not exceed in value the sum of $600," sufficiently shows the value of the property claimed as exempt. *Ib.*

EXEMPTION.

See EXECUTION; TAXES, 15.

EXHIBITS.

See COUNTY ORDER, 3; JUSTICE OF THE PEACE, 3; PLEADING, 4; PROMISSORY NOTE, 16.

EXTENSION OF TIME.

See PROMISSORY NOTE, 3.

FACTOR.

See BANKRUPTCY.

FEES AND SALARIES.

See CONSTITUTIONAL LAW, 1; COUNTY CLERK, 2.

1. *Sheriff's Mileage.—Constructive Fees.—Statute Construed.*—Under the fee and salary law of 1879, Acts 1879, p. 130, which allowed the sheriff mileage "for each mile necessarily travelled in going and returning to serve process," and forbade the charging of any constructive fee, the sheriff was not entitled to charge, for serving a special *venire* for jurors in a criminal case, mileage for double the distance from the court-house to the place where each juror was served. "Necessarily travelled" can not mean more than "actually travelled." *Board, etc.*, v. *Pressley*, 361
2. *Same.—Right of Appeal.*—The decision of the circuit court in reference to an officer's fees is not made final by force of the 36th section of the fee and salary act of 1879, Acts 1879, p. 130, and from the decision of such court, on appeal from the decision of a board of commissioners, there may be an appeal to the Supreme Court. *Ib.*

FENCE.

See RAILROAD, 7, 8.

FINDING.

See COUNTY AUDITOR, 2; MORTGAGE, 6; PRACTICE, 8; SPECIAL FINDING; VERDICT.

FINES AND FORFEITURES.

See COUNTY CLERK, 2, 4.

FIRE INSURANCE.

See INSURANCE.

FORECLOSURE.

See JUDGMENT, 3, 4; MARRIED WOMAN, 1, 2; MORTGAGE; PROMISSORY NOTE, 17 to 20; SHERIFF'S SALE, 19.

FOREIGN INSURANCE COMPANY.

See CRIMINAL LAW, 17; INSURANCE, 11.

FOREIGN STATUTES.

See EVIDENCE, 5.

FORGERY.

See PROMISSORY NOTE, 11, 12.

FORMER ACQUITTAL.

See CRIMINAL LAW, 11.

FORMER ADJUDICATION.

See INJUNCTION BOND, 1; PARTITION.

1. *Grounds of Defence.*—A matter finally determined by a competent tribunal is considered forever at rest, and the adjudication includes every ground of defence which might have been litigated in the case.
Ballard v. *Franklin L. Ins. Co.*, *259*

2. *Same.—Promissory Note.—Answer of Fraudulent Alteration.—Reply.*—Where in an action upon a promissory note the maker answers a fraudulent alteration by the plaintiff, as adjudicated in a former action thereon, a reply that the alteration, if made at all, was made by the plaintiff's collecting agent without her fault, knowledge, connivance or consent, is bad. *Ib.*

FRAUD.

See CHATTEL MORTGAGE, 5; CONTRACT, 2, 3; EXECUTION, 4; FORMER ADJUDICATION, 2; FRAUDULENT CONVEYANCE; PROMISSORY NOTE, 7; TAXES, 8; TOWNSHIP TRUSTEE, 8.

Contract.—Rescission.—Partnership.—Receiver.—Complaint.—Verdict.—Judgment.—Excessive Damages.—Vendor and Purchaser.—Complaint in two paragraphs, alleging fraudulent representations whereby the plaintiff was induced to purchase for $1,281 an interest in the property, machinery and trade of a factory worth only $800, and become a partner. One paragraph prayed damages, the cancellation of a note given for part of the purchase-money, *the appointment of a receiver*, and for general relief; the other added a prayer to annul the contract. The verdict found for the plaintiff damages in the sum which had been paid, and that the note be cancelled, but was silent as to annulling the contract.
Held, that the complaint was good on demurrer.
Held, also, that the damages were excessive, since a judgment in accordance with the verdict would leave the plaintiff owner of the property bought. *Greenewald* v. *Rathfon*, *547*

FRAUDULENT CONVEYANCE.

See SHERIFF'S SALE, 4, 5.

1. *Creditor's Bill.—Defence.*—In a suit by a creditor to set aside a convey-

ance of real estate, alleged to have been executed by his debtor for the fraudulent purpose of cheating, hindering and delaying the creditor in the collection of the debtor's indebtedness to him, the answer of the debtor, to the effect that, at the time of the commencement of the suit, no part of his indebtedness to the creditor was due and unpaid, will constitute a complete defence, in bar of such suit. *Collins* v. *Nelson*, 75

2. *Subsequent Creditor.—Judgment.—Costs.—Execution.*—Where one, already embarrassed beyond his ability to pay, in anticipation of a possible indebtedness for costs of a lawsuit which he afterwards commences, and for the purpose of evading payment thereof, conveys real estate to another, upon a secret arrangement that the latter shall pretend to own it, that it may escape execution, but hold it for the use of the grantor, and that his other assets shall be disposed of before the liability for costs shall accrue, it may be made subject to execution to satisfy a subsequent judgment for such costs, if other property can not then be found liable to execution. *Stevens* v. *Works*, 445

GARNISHMENT.

See ATTACHMENT.

GIFT ENTERPRISE.

See CRIMINAL LAW, 3 to 7.

GRAVEL ROAD COMPANY.

See NEGLIGENCE, 5 to 7.

GUARDIAN AND WARD.

See SET-OFF; WITNESS.

1. *Action on Bond.—Pleading.—Appraisement.—Sale.*—A complaint on a guardian's real estate bond, to recover for failure to account for the proceeds of the real estate sold, need not show an appraisement of the real estate. *Corbaley* v. *State, ex rel.*, 62

2. *Set-Off.—Answer of Surety.—Parent and Child.*—In such an action, the guardian being the father of the wards, an answer of set-off by the surety, alleging that the wards were indebted to the guardian in a sum named, "for board, clothing and maintenance," is bad on demurrer. *Ib*

3. *Same.*—An answer in such case, that, the wards being of tender years and unable to earn support, the guardian, who was their father, being destitute of means to support and educate his children and wards, was compelled to apply thereto the proceeds of said real estate, and now refuses to make claim against them on account thereof, is sufficient. *Ib.*

4. *Same.—Statute of Limitations.*—An answer, in such case, by a surety, alleging that the cause of action did not accrue within three years next before the commencement of the action, is bad. *Ib.*

5. *Bond.—Reports.—Evidence.*—In an action upon a guardian's bond, where the breach assigned is that the guardian had taken the notes of insolvent persons, without security, for the rents of his ward's real estate, the guardian's reports to the court are competent evidence for the purpose of identifying such notes, which were in evidence, as the notes which had been in possession of the guardian. *French* v. *State, ex rel.*, 151

6. *Parties.*—In a suit upon a claim due from the defendant as guardian, the ward is neither a necessary nor a proper party. *Ray* v. *McGinnis*, 451

7. *Same.—Claim against Ward's Estate for Money Borrowed by Guardian to Remove Liens on Real Estate.*—Money loaned to a guardian who is authorized by the court to borrow the same for the purpose of removing liens from the land of his ward, and who uses it for such purpose, constitutes a claim against such ward's estate, and the person who loans it may recover it from such estate. *Ib.*

3. *Removal from State.—Bond.—Damages.*—In an action by a ward, in 1880, upon the bond of his guardian who had, in 1873, removed from the State without accounting and paying over, the measure of damages upon recovery was provided by section 163, 2 R. S. 1876, p. 551.
English v. *State, ex rel.*, *455*

HARMLESS ERROR.

See INSTRUCTIONS, 2; PRACTICE, 8; SUPREME COURT, 3, 9, 17, 18, 23; TAXES, 13; VERDICT, 4.

HEIR.

See EVIDENCE, 1; REAL ESTATE, ACTION TO RECOVER, 6.

HIGHWAY.

See NEGLIGENCE, 5 to 7; TOWNSHIP.

1. *Obstruction.—Vacation.*—A public highway is not vacated by the temporary turning out of travel from the main track and the use of adjoining land temporarily to avoid an obstruction.
Davis v. *Nicholson*, *183*

2. *Same.—Penalty.*—Such temporary divergence will not excuse the felling of a tree across the obstructed main track, in violation of sec. 24, 1 R. S. 1876, p. 860; R. S. 1881, sec. 5082. *Ib.*

HUSBAND AND WIFE.

See MARRIED WOMAN; MORTGAGE, 4; SHERIFF'S SALE, 1; VOLUNTARY ASSIGNMENT.

Wife's Inchoate Interest Subject to Incumbrances Existing at Time of Marriage.—The inchoate interest acquired by the wife in real estate owned by the husband at the time of the marriage is subordinate to existing incumbrances, whether recorded or not, and whether she had notice of them or not. *Godfrey* v. *Craycraft*, *476*

IMPEACHMENT OF PUBLIC OFFICER.

See CONSTITUTIONAL LAW, 3.

INDEMNIFYING MORTGAGE.

See CHATTEL MORTGAGE, 2.

INDICTMENT.

See CRIMINAL LAW, 9, 15.

INFORMATION.

See CORPORATIONS, 3, 4; CRIMINAL LAW, 4, 12; TURNPIKE COMPANY, 6.

INJUNCTION.

See TAXES, 6, 16.

INJUNCTION BOND.

1. *Action on.—Judgment in Another Action not a Bar.—Transcript.—Evidence.—Damages.*—On trial of an action on an injunction bond, a transcript of the record of another subsequent action, wherein the defendant obtained the injunction sought, is not admissible in evidence to bar the action, nor in mitigation of damages. *Swan* v. *Timmons*, *243*

2. *Same.—Measure of Damages.—Attorney's Fees.*—The dismissal of an action in which an injunction bond was given entitles the defendant to recover his expenses incurred in making the necessary resistance to that action, including reasonable attorney's fees; but, if other relief was sought, the attorney's fees must be restricted to those necessarily incurred in defeating the injunction. *Ib.*

INSANITY.

1. *Contract.—Unsoundness of Mind.*—The contract of an insane person, whose disability has not been judicially determined, is voidable only, and not void. *Fay* v. *Burditt*, 433
2. *Same.—Disaffirmance.—When Contract of Insane Person will not be Set Aside.*—An insane person, unless his insanity had been judicially declared before the contract was made, has not the same unqualified right, as an infant or married woman, to disaffirm his contract; and when there is nothing in his appearance, conversation or conduct to indicate his mental incapacity, and he makes a contract with one without notice of his condition, which is in itself fair and just, and such contract becomes so far executed that the parties can not be placed *in statu quo*, it will not be set aside. *Ib.*
3. *Same.—Chattel Mortgage.—Title to Property.—Possession.—Demand.—Replevin.*—A chattel mortgage executed by an insane person, whose mental unsoundness has not been judicially determined, will vest the title, and, after default in the condition, the right of possession of the chattel in the mortgagee; and actual possession obtained under it can not be made wrongful without a disaffirmance. In such case, there must be, therefore, a disaffirmance before an action can be maintained to recover the chattel from the mortgagee.

Semble, that a party to a contract should not be allowed to disaffirm on account of insanity, without restoring what he had received, or offering to make compensation therefor, if the other party acted in good faith, and the contract itself was fair. *Ib.*

4. *Same.—Instructions.—Burden of Proof.—Shifting of Burden.*—In an action by the mortgagor of a chattel, to recover possession on the ground of his insanity when he made the mortgage, it was not error to instruct, "That the plaintiff must have established, by a preponderance of evidence, that he was insane at the time he executed the note and mortgage;" nor in refusing to instruct "That if the plaintiff had established by a preponderance of the evidence, that he was of unsound mind prior to the making of the chattel mortgage, then the burden of proof is cast upon the defendant to show that the plaintiff was of sound mind at the time," etc. The burden of proving insanity is on the one who alleges it.

Quære, whether it is quite accurate to say that the burden of a particular affirmative issue ever shifts in the course of the trial from one party to the other. *Ib.*

INSOLVENCY.

See Courts, 2; Guardian and Ward, 5; Promissory Note, 3, 17.

INSURANCE.

See Criminal Law, 17, 18.

1. *Fire Insurance.—Pleading.—Condition Precedent.—"Fulfilled" and "Performed" Equivalent.*—The allegation in a complaint, in an action upon an insurance policy, that "the plaintiffs duly fulfilled all the conditions of said agreement and insurance on their part," is sufficient. The word "fulfilled" is equivalent to the word "performed," as used in sec. 84 of the code, R. S. 1881, sec. 370. *Ætna Ins. Co.* v. *Kittles*, 96
2. *Same.—Notice, Proof and Demand.*—In such case, a further allegation of due notice and proof of loss, and demand of payment, constitutes no part of the general allegation of performance, but only shows that an action had accrued. *Ib.*
3. *Same.—Insurable Interest at Time of Loss.—Complaint.*—A complaint on a policy of insurance must show that the plaintiff had an insurable interest at the time of the loss. *Ib.*

4. *Same.—Repayment of Premium.—Cancellation of Policy.—Answer.*—Repayment of unearned premium and a cancellation of the policy constitute a good defence to a complaint on an assigned policy of insurance by the assured. *Ib.*

5. *Life Insurance.—Provision Forfeiting Policy for Non-Payment of Premium.*—Where a policy expressly and fully provides that a failure to pay premiums at the times therein stipulated shall cause a forfeiture, the failure to pay as stipulated will, unless some excuse or waiver is shown, work a forfeiture of the policy.
Willcuts v. *Northwestern, etc., Ins. Co.*, *300*

6. *Same.—Right to Recover Proportionate Part of Insurance on Partial Payment of Premium.*—Where the policy expressly provides that a failure to pay premiums at the times stipulated shall cause a forfeiture, the insured is not entitled because of payment of part of the premium to recover a proportionate amount of the policy. In such a case the rule that where one does work under a special contract, but does not perform the entire contract, he may recover upon the *quantum valebat*, has no application, for such a contract of insurance is an indivisible one. *Ib.*

7. *Same.—Custom as to Payment of Premium.—Demurrer to Evidence.*—A custom, that a payment of the premium may be made in a different manner from that provided in the policy, can not, even upon a demurrer to the evidence, be inferred from a single act. The fact that the insurance company in one instance allowed credit to the insured for a claim for services, and accepted the balance of the premium in money, does not warrant the inference of a custom to accept pay in services. *Ib.*

8. *Same.—Policy.—Conditions.—Covenants.*—Where there is a full and valid express covenant or condition in a policy of insurance, there can be no implied one, respecting the same subject. *Ib.*

9. *Same.—Modification of Policy by New Parol Contract.*—A policy may be modified by a new and distinct parol contract. *Ib.*

10. *Same.—Member of Mutual Insurance Company.*—The fact that the insured becomes a member of a mutual life insurance company does not prevent a lapse of his policy and a termination of liability upon it by reason of his failure to perform the conditions required by the terms of the policy to keep it in force. The stipulations of the contract and its construction are none the less binding, because made between the corporation and a member. *Ib.*

11. *Same.—Waiver of Condition in Policy.—Power of General Agent.*—A general agent of a foreign insurance company, possessing competent authority, may waive the condition in the policy that the premium should be paid in money. A mere local agent could not. *Ib.*

12. *Same.—Payment of Part Premium.*—An insured member of a mutual life insurance company is not entitled to a proportionate part of the amount of his policy of insurance, when only a part of the premium is paid, in contravention of the conditions of the policy, that if not paid on a certain day it should cease. *Ib.*

13. *Same.—Tender of Premium.—Notice.*—An insurance company, by demanding more than it is entitled to receive, and notifying the insured that nothing but a compliance therewith will be deemed performance, will excuse the insured from tendering the premium; but a notice requesting payment of a premium, calling attention to the conditions of the policy, etc., can not be construed as intended to mean that the company repudiated an agreement to receive as part payment of the premium a bill for services of the insured, and excuse him from the payment of the balance of the premium, in accordance with the terms of the policy. *Ib.*

14. *Same.—Construction of Policy.*—Where parties have, by their own acts under the policy, placed a construction upon a policy of insurance, the courts will carry that construction into effect. *Ib.*

INSURANCE AGENT.

See CRIMINAL LAW, 17, 18.

INSURANCE COMPANY.

See CRIMINAL LAW, 17, 18; INSURANCE.

INSTRUCTIONS.

See INSANITY, 4; LIQUOR LAW, 2; PRACTICE, 1, 4; SLANDER, 2; SUPREME COURT, 18; VERDICT, 3 to 5.

1. *Erroneous Conclusion.*—An instruction which, having stated a part only of the evidence given relative to the issue, concludes: "Your finding should be for the plaintiff," is erroneous. *Thompson* v. *Boden*, 176
2. *Practice.—Harmless Error.*—If all the instructions, taken as a whole, fully give the law of the case, it is not material that a single one may, in itself, omit something which ought to be given.
Branstetter v. *Dorrough*, 587

INTEREST.

See PROMISSORY NOTE, 12, 14; TAXES, 17.

INTOXICATING LIQUOR.

See LIQUOR LAW.

INTOXICATION OF PUBLIC OFFICER.

See CONSTITUTIONAL LAW, 3.

JEOPARDY.

See CRIMINAL LAW, 11.

JUDGMENT.

See APPEAL; APPEAL BOND; ATTACHMENT, 8; ATTORNEY; BASTARDY; COSTS; DRAINAGE, 2, 3; FRAUD; FRAUDULENT CONVEYANCE, 2; MARRIED WOMAN; PRACTICE, 5; REVIEW OF JUDGMENT; SHERIFF'S SALE, 12, 18; SUPERIOR COURTS; TAXES, 9; VENDOR AND PURCHASER, 5.

1. *Practice.—Judgment Reopened.—Section 601, R. S. 1881.—Complaint.—Demurrer.*—A party notified by publication only, and who has had a judgment against him opened under sec. 601, R. S. 1881, may demur to the original complaint for such cause as would not be deemed amendable on appeal, or cured by the verdict on motion in arrest.
Smith v. *King*, 217
2. *Mistake.—Error of Law.—Complaint.*—A complaint to correct a judgment for mistake, which does not show any mistake in the entry, but merely an error of law, is insufficient, and no relief can be granted thereon. *Bole* v. *Newberger*, 274
3. *Same.—Sheriff's Sale.—Foreclosure.—Bona Fide Purchaser.—Notice.*—The order of sale on foreclosure of a mortgage is the sheriff's authority to sell, and if he sell to the plaintiff for the whole debt (the order being to make only a part) more of the mortgaged property than is directed by the order, the latter is not a *bona fide* purchaser without notice of the irregularity, but of such sale the defendant may be relieved, and on his prayer the court may confirm title in the plaintiff to so much of the property as was directed to be sold, and adjudge the rest to the defendant. *Ib.*
4. *Same.—Reformation of Judgment of Foreclosure.*—Where, on complaint to foreclose a mortgage to secure several instalments, the judgment

directed the sale of a part of the lands mortgaged to make the amount of the instalments then due—being silent as to the instalments not due—and the sheriff sells the *whole* of the lands to the plaintiff, the latter can not by complaint, without showing that the judgment entered was other than the court intended, obtain its reformation; and it is doubtful whether he can, by an original suit, have any relief. *Ib.*

5. *Validity of Judgments.—Collateral Attack.*—The judgment of a court of general jurisdiction, having jurisdiction both of the subject-matter and of the parties, is valid, binding and conclusive, as to the matter in controversy, upon the parties, and those claiming under them; and, even though erroneous, such judgment can not be impeached or attacked in any collateral suit or proceeding. *Sauer* v. *Twining*, *368*
6. *Assignment of Error.—Supreme Court.*—When the judgment appealed from is defective and incomplete, but no error is assigned thereon, and no available error has been committed in the proceedings which led to it, it will not be reversed. *Garis* v. *Board, etc.*, *480*
7. *Practice.—Supreme Court.*—Objection to the form of a judgment can not be made, for the first time, in the Supreme Court. *Evans* v. *Feeny*, *538*

JUDICIAL NOTICE.

See CRIMINAL LAW, 3.

JUDICIAL SALE.

See MARRIED WOMAN; SHERIFF'S SALE.

JURISDICTION.

See CIRCUIT COURTS, 2; ELECTIONS; JUSTICE OF THE PEACE, 3 to 4; RECOGNIZANCE, 2, 3.

JURY.

See EXECUTION, 3; INSTRUCTIONS; LIQUOR LAW, 2; PRACTICE, 1; VERDICT.

Communication of Court With.—Coercion of Agreement by Threat.—Practice.—It is error for the court, without the consent of a party, to send word to the jury, by the bailiff in charge, that if they do not agree to a verdict, he will keep them together until Saturday—that is to say, for four days. Such threat is an improper effort to coerce into an agreement. *Terre Haute, etc., R. R. Co.* v. *Jackson*, *19*

JUSTICE OF THE PEACE.

1. *Bail Bond.*—A justice of the peace can not fix the bail in cases of felony at the time of issuing the warrant. *State* v. *Winninger*, *51*
2. *Jurisdiction.—Amount in Controversy.*—The jurisdiction of a justice of the peace, in civil suits founded on contract or tort, under section 1433, R. S. 1881, is limited to the amount of two hundred dollars. *Nat'l Bank, etc.*, v. *Hutton*, *101*
3. *Same.—Complaint.—Bill of Particulars.—Practice.*—Where a bill of particulars, filed with the complaint, shows that the plaintiff's claim or cause of action does not exceed the sum of two hundred dollars, the justice will have jurisdiction of the case, even though the prayer of the complaint is for a sum in excess of two hundred dollars; for, in such case, the amount in controversy can not exceed the amount of the demand as stated in the bill of particulars. *Ib.*
4. *Same.—Appeal from Justice.—Jurisdiction of Circuit Court.*—If the justice of the peace have jurisdiction of a cause, on appeal from such justice, the circuit court will also have jurisdiction of such cause. *Ib.*
5. *Breaches of Bond.—Evidence.—Conversion.*—In an action upon the bond of a justice of the peace, the complaint alleging as breaches his conversion of money collected on judgments and his failure to bring suit upon

claims, evidence of his collection of money for the plaintiffs without process is not admissible. *Hackler* v. *State, ex rel.*, *430*

LANDLORD AND TENANT.

See CRIMINAL LAW, 15, EMBLEMENTS; REAL ESTATE, ACTION TO RECOVER, 1 to 5; SHERIFF'S SALE, 18, 19.

Tenancy.—Where the term of a tenancy is uncertain, the tenant who sows a crop is entitled to reap it. *Heavilon* v. *Farmers Bank*, *249*

LEASE.

See LANDLORD AND TENANT; REAL ESTATE, ACTION TO RECOVER, 2 to 5.

LEX SITUS.

See MORTGAGE, 1.

LIEN.

See CHATTEL MORTGAGE, 2; GUARDIAN AND WARD, 7; MORTGAGE, 5, 6; PARTNERSHIP; SHERIFF'S SALE, 15; TAXES; VENDOR AND PURCHASER, 4, 5.

LIFE INSURANCE.

See INSURANCE.

LIQUOR LAW.

1. *Intoxicating Liquor.—Beer.—Selling on Sunday.—Evidence.*—On trial of an indictment for selling liquor on Sunday, evidence, to wit: "Am sure it was on Sunday. Mr. K. got a glass of beer for himself and one for me. Defendant handed us the liquor; K. paid for it five cents a glass; beer is an intoxicating liquor," shows that the beer so sold was an intoxicating liquor, and is sufficient to sustain a conviction. *Pancake* v. *State*, *93*

2. *Same.—Instruction.—Assuming Fact.—Jury.*—On such trial it was error to instruct the jury: "It would be a legitimate inference for you to draw that the witness, in saying beer was intoxicating, had reference to the beer spoken of by him when he said he had purchased beer of the defendant." The inference from the facts is a question for the jury, and not a matter of law for the court. *Ib.*

3. *Same.*—If the evidence show that the intoxicating liquor was sold on some Sunday within two years prior to the return of the indictment, it need not fix the precise Sunday within that time. *Ib.*

LIS PENDENS RECORD.

See VENDOR AND PURCHASER, 1, 2.

Statute Construed.—The act of 1877 concerning *lis pendens*, Acts 1877, Special Session, p. 54, had no retroactive effect, and therefore did not apply to cases pending when it took effect, nor did it apply to cases in the courts of the United States. *Wilson* v. *Heffin*, *35*

LOTTERIES.

See CRIMINAL LAW, 3 to 7.

MALICE.

See SLANDER, 2.

MANDAMUS.

See DRAINAGE, 3.

MARRIED WOMAN.

See HUSBAND AND WIFE; VOLUNTARY ASSIGNMENT.

1. *Inchoate Interest in Husband's Land Sold on Foreclosure.—Mortgage.—Vested Right.—Act of 1875 Construed.*—When a man's land has been sold upon foreclosure of a mortgage made by him alone before the

passage of the act of 1875, Acts 1875, p. 178, the inchoate interest of the wife is not affected by that law. The vested right of the mortgagee could not be impaired by an enlargement of the inchoate right of the wife. *McGlothlin* v. *Pollard*, 228

2. *Same.—Redemption.—Wife's Transfer of Right.—Conveyance.—Party.*—If a wife is not made a party to a foreclosure suit against the husband, her right to redeem from a sale under the decree continues unaffected, and this right she may transfer to another, by joining her husband in the execution of a deed. *Ib.*

3. *Conveyance.—Inchoate Interest in Land of Husband.—Statute Construed.—Judicial Sale.*—A wife's inchoate interest in real estate is not a present interest which can be transferred, but only a contingent right, which will be barred or extinguished by her joining in a deed of conveyance with the husband; and when she has joined in such conveyance, the act of March 11th, 1875, section 2508, R. S. 1881, can not apply to a subsequent judicial sale, though under a judgment rendered against the husband before the conveyance was made. *Hudson* v. *Evans*, 596

4. *Same.—Sheriff's Sale.—Judgment.*—A. and wife conveyed land of A. to P., who conveyed the same to E. By virtue of an execution upon a judgment against A., the land was afterwards duly sold and conveyed by the sheriff to H.

Held, in an action by H. to recover possession of the land, that the act of 1875, concerning the wife's inchoate right, did not apply, and that the wife of E. had no interest in the land under said act. *Ib.*

MASTER AND SERVANT.

See CORPORATIONS, 5; NEGLIGENCE, 1; RAILROAD, 1 to 4.

MEASURE OF DAMAGES.

See CHATTEL MORTGAGE, 4; FRAUD; GUARDIAN AND WARD, 8; INJUNCTION BOND.

MERGER.

See PROMISSORY NOTE, 20.

MILEAGE.

See FEES AND SALARIES.

MISNOMER.

See ATTACHMENT, 3, 7; TAXES, 14.

MISTAKE.

See CITY; JUDGMENT, 2 to 4; MORTGAGE, 2, 6, 7; PROMISSORY NOTE, 11; SHERIFF'S SALE, 17; SPECIFIC PERFORMANCE, 2; TOWNSHIP TRUSTEE, 1, 2.

Voluntary Payment.—Money paid through a mistake of facts, with the means of knowing the facts within reach of the party, can not be recovered back. *Butt* v. *Jennings School T'p*, 69

MORTGAGE.

See CHATTEL MORTGAGE; JUDGMENT, 3, 4; MARRIED WOMAN, 1, 2; PROMISSORY NOTE, 17, 18 to 20; SHERIFF'S SALE, 15 to 19; SUPREME COURT, 24; VENDOR AND PURCHASER, 3; VOLUNTARY ASSIGNMENT.

1. *Situs of Land.—State.—Presumption.*—A deed or mortgage, made in the form prescribed by the law of the State, which purports to have been executed and acknowledged in and between parties resident in the State, and contains nothing to indicate a contrary intention, will be presumed to be of land in the State. *Dutch* v. *Boyd*, 146

2. *Same.—Correction of Mistake.—Statute of Frauds.*—The correction of a

description of the premises conveyed, in a deed or mortgage, is not forbidden by the statute of frauds. *Ib.*

3. *Pleading.—Parties.*—A complaint by A., in the usual form, to foreclose a mortgage given to A. and B. to secure a note payable to A., is not bad for want of sufficient facts. If objectionable at all, it is for want of proper parties. *Chrisman* v. *Chenoweth*, *401*

4. *Parties.—Husband and Wife.—Notice.*—In a suit to foreclose a mortgage upon lands purchased by a married woman subsequent to the mortgage, her husband is a proper party defendant, and it is not necessary to aver that he had notice of the mortgage. *Andrews* v. *Swanston*, *474*

5. *Same.—Mortgage Liens, Priority of.—Counter-Claim.*—One who is made defendant to a complaint to foreclose a mortgage, and who holds a prior lien, may, by counter-claim, have the priority established. *Porter* v. *Reid*, *569*

6. *Same.—Special Finding.—Practice.*—Where, to a complaint to foreclose a mortgage, a defendant by counter-claim sets up a prior mortgage, seeking to have the priority established, to which the answer is a general denial and payment, a special finding that the defendant's mortgage, though it describes the property embraced in the plaintiff's mortgage, was not so intended, and a conclusion of law that it is not a prior lien, are not within the issues, and therefore irrelevant, and an exception thereto should be sustained. *Ib.*

7. *Same.—Answer.—Mistake.—Description of Land in Mortgage.*—An answer to a counter-claim which sets up a prior mortgage on the premises (on which the plaintiff seeks a foreclosure), alleging a material mistake in the description of the lands in the defendant's mortgage, and that it was not intended to include the same lands, is good on demurrer. *Ib.*

MUNICIPAL CORPORATIONS.

See CITY; NEGLIGENCE, 1; TAXES, 6, 15; TOWNSHIP; TOWNSHIP TRUSTEE, 8.

NAME.

See CRIMINAL LAW, 7; TURNPIKE COMPANY, 5; WILL, 8.

NEGLIGENCE.

See ATTORNEY; NEW TRIAL, 6; RAILROAD, 2 to 4, 8; TOWNSHIP.

1. *City.—Complaint.—Knowledge of Defective Machinery.—Personal Injury.*—Complaint by an employee against a city for personal injury, averring that the injuries resulted from defects in a fire engine of which he had charge, which were known to the defendant and unknown to the plaintiff. It was objected on demurrer that it should have been alleged that the defects were known to some proper officer of the city. *Held*, that the objection was insufficient. *City of Lafayette* v. *Allen*, *166*

2. *Railroad.—Complaint.*—A complaint which avers that the servants and employees of a railroad company, while the plaintiff's horse was upon a highway near a railroad crossing, stopped the engine at the crossing and negligently caused the steam to escape, making a great noise, after having been requested not to do so, whereby the horse became frightened, reared up and fell backwards, killing himself, shows that the injury was the "natural and proximate" result of the negligence. *Louisville, etc., R. R. Co.* v. *Schmidt*, *264*

3. *Same.—Contributory Negligence.*—A party, who is himself guilty of contributory negligence, can not recover for injury to himself or property. *Ib.*

4. *Same.—Railroad Crossing Street.—Killing Horse.*—A party who drives a horse toward a railroad crossing, upon or near which an engine is

standing, and, notwithstanding the fact that the horse is frightened at the engine, thereafter leads him toward the crossing, until a narrower point in the street is reached, where it is difficult to turn him, and the horse becomes so frightened as to be unmanageable, and then rears and falls backward and kills himself, is guilty of contributory negligence, and can not maintain an action against the railroad company for such injury. *Ib.*

5. *Injuries to Person.—Contributory Negligence.—Question of Fact.*—In a suit against a gravel road company to recover damages for injuries to the plaintiff, resulting, as alleged, from obstructions in, and the bad repair of, the defendant's road, the question as to whether or not the plaintiff's negligence contributed to the alleged injuries, is a question of fact, and, as such, is properly left to the jury.
Ramsey v. *Rushville, etc., G. R. Co., 394*

6. *Same.—Obstructions in Roadway.—Evidence.*—In such a suit, where the plaintiff's injuries were received by the overturning of his buggy, caused, as claimed, by obstructions in the defendant's roadway, the testimony of witnesses, that in attempting to pass the same obstructions by driving around them, within a few days of the time, and at or near the same place, when and where the plaintiff's buggy was overturned, their sleighs, though driven in a careful manner, were also overturned, was outside of the issues in the case, and incompetent evidence. *Ib.*

7. *Same.—Necessary Deviation.—Ordinary Care.*—If the travelled portion of the roadway is obstructed or dangerous, making it necessary for a traveller to deviate therefrom, he must use ordinary care in making such deviation; for, in the absence of such care, the road corporation will not be liable for injuries sustained by reason of the obstruction. Ordinary care would prevent a traveller, in deviating from the roadway to avoid an obstruction, from driving upon ground so sideling as to appear dangerous to a prudent man. *Ib.*

NEW TRIAL.

See ARBITRATION AND AWARD, 1; ASSIGNMENT OF ERROR; BILL OF EXCEPTIONS, 1; PRACTICE, 2; REFEREE; SPECIAL FINDING; SUPREME COURT, 2, 4, 14, 15, 21; VERDICT, 2.

1. *Practice.—Recovery.*—A motion for a new trial, on the ground that the finding is contrary to law, or to the evidence, presents no question in reference to the amount of the recovery. *McElhoes* v. *Dale, 67*

2. *Record.*—A ruling assigned as cause for a new trial, to be available in the Supreme Court, must appear by the record to have been made, the statement of it in the motion not being sufficient. *Highfill* v. *Monk, 205*

3. *Evidence Offered.*—A reason in a motion for a new trial was that the court erred in permitting the defendant "to *offer* in evidence" over objection certain evidence.
Held, that the word "offer" as used was equivalent to the word "read."
Ansley v. *Meikle, 260*

4. *New Trial as of Right.—Evidence.—Payment of Costs.*—A motion for a new trial as matter of right, on payment of costs, must be supported by proof of the payment. *Railsback* v. *Walke, 409*

5. *Practice.—Joint Motion for New Trial.*—A joint motion for a new trial must be good for all who join in it, else it is not available for any of them, and where the finding and judgment are for one defendant and against another, a joint motion for a new trial will not avail either of them. *Robertson* v. *Garshwiler, 463*

6. *Negligence.*—Where a party negligently and without excuse fails to prepare for trial, he can not get a new trial because of surprise, and of accident preventing his presence at the trial; and if upon such a mo-

tion there be counter affidavits contradictory of the statements of those in support, the Supreme Court will not interfere with the ruling on the motion. *Andrews* v. *Swanton*, 474

7. *Practice.—Damages.*—The Supreme Court can not consider any question as to the inadequacy of damages given, unless it has been assigned as cause for a new trial. *Langohr* v. *Smith*, 495

NOMINAL DAMAGES.

See TRESPASS, 2.

NON EST FACTUM.

See PROMISSORY NOTE, 1.

NOTICE.

See CRIMINAL LAW, 6; INSURANCE, 2, 13; JUDGMENT, 1, 3; MORTGAGE, 4; PARTITION; PARTNERSHIP; SHERIFF'S SALE, 8, 14, 16; VENDOR AND PURCHASER, 2.

OFFICE AND OFFICER.

See CONSTITUTIONAL LAW, 3; COUNTY AUDITOR; COUNTY CLERK; CRIMINAL LAW, 8; JUSTICE OF THE PEACE; RECOGNIZANCE, 3; SHERIFF; SHERIFF'S SALE; TOWNSHIP TRUSTEE.

OFFICIAL BOND.

See COUNTY CLERK.

PARENT AND CHILD.

See GUARDIAN AND WARD, 2, 3.

PARTIES.

See APPEAL; GUARDIAN AND WARD, 6; MARRIED WOMAN, 2; MORTGAGE, 3, 4; PRACTICE, 16; PROMISSORY NOTE, 2; SUPREME COURT, 10, 24; WITNESS.

PARTITION.

See PLEADING, 4; WILL, 7.

Cross Petition.—Notice.—Res Adjudicata.—If a person, not named in the petition for partition, becomes a party, and files a cross petition, claiming that certain defendants had conveyed their alleged interests to him, there can be no valid finding and decree in reference to the cross petition without legal notice of the filing thereof, or an appearance thereto by such defendants. The original petitioners, under section 7 of the act concerning partition, 2 R. S. 1876, p. 343, may dispute the right of such third person to appear if hostile to their interests, but they can not represent such defendants. *Smith* v. *King*, 217

PARTNERSHIP.

See CONTRACT, 2, 3; FRAUD.

Chattel Mortgage.—Lien.—Notice.—Principal and Surety.—Where, by the contract of copartnership, it is stipulated that one partner shall hold a lien upon the property of the firm, as indemnity for any liability he may incur as surety for the other, and afterwards the other partner mortgages his interest in the partnership property to a third person, without notice of this stipulation, the mortgage will be postponed in favor of the lien created by the stipulation, the mortgagee being charged with notice of the latter. *Lewis* v. *Harrison*, 278

PAYMENT.

See COUNTY CLERK, 5; INSURANCE, 5 to 7, 12, 13; MISTAKE; NEW TRIAL, 4; PLEADING, 9, 10; PRINCIPAL AND AGENT, 3; PROMISSORY NOTE, 4, 5, 11, 12 to 14; SHERIFF, 2.

PENALTY.

See HIGHWAY, 2.

PERJURY.

See CRIMINAL LAW, 9, 10.

PERFORMANCE.

See CONTRACT, 6; INSURANCE, 1, 13; REAL ESTATE, ACTION TO RECOVER, 4.

PLEADING.

See APPEAL BOND; ATTACHMENT, 3; ATTORNEY; CONTRACT, 4, 6; CORPORATIONS, 1, 3; COUNTY CLERK, 1, 4; COUNTY ORDER, 2, 3; CRIMINAL LAW, 4, 5, 9, 11, 12, 15, 19; DECEDENTS' ESTATES, 3; EXECUTION, 5; FORMER ADJUDICATION; FRAUD; CONVEYANCE, 1; GUARDIAN AND WARD, 1 to 4; INSURANCE, 1 to 4; JUDGMENT, 1 to 4; JUSTICE OF THE PEACE, 3, 5; MORTGAGE, 3 to 7; NEGLIGENCE, 1, 2; PRACTICE, 14 to 17; PROMISSORY NOTE, 1, 8, 13, 16, 18; REAL ESTATE, ACTION TO RECOVER, 1 to 3; RECEIVER; RECOGNIZANCE, 1; SHERIFF, 1; SHERIFF'S SALE, 1, 2, 8; SLANDER, 1; SPECIFIC PERFORMANCE; TAXES, 4, 6, 12; TOWNSHIP TRUSTEE, 3; TRESPASS, 1; TURNPIKE COMPANY, 1; VENDOR AND PURCHASER, 3, 4; WILL, 6.

1. *Joint Complaint.*—The complaint of two or more persons must show a right of action in both. *Ætna Ins. Co.* v. *Kittles, 96*

2. *Same.—Bad Answer to Bad Complaint.*—A bad answer is good enough for a bad complaint. *Ib.*

3. *Practice.—Demurrer Carried Back.*—A demurrer to an answer should be carried back and sustained to a bad complaint. *Ib.*

4. *Partition.—Written Instrument.—Exhibit.*—The deeds through which one claims title are not the foundation of his action for partition or to quiet title, and copies thereof filed with the complaint can not be looked to in passing upon a demurrer to the complaint. *Smith* v. *King, 217*

5. *Same.—Anticipation of Defence.*—It is not proper, in anticipation of the defence, to aver in the complaint matters which do not aid the statement of the cause of action. *DuPont* v. *Beck, 271*

6. *Same.—Answer.—Reply.*—A paragraph of reply to two paragraphs of answer, which avers nothing in denial or avoidance of one of them, is bad on demurrer. *Chrisman* v. *Chenoweth, 401*

7. *Defects Cured by Verdict.*—When a party is made defendant to answer to his interest, he can not, after verdict, object to the complaint that his interest is not specifically stated. *Andrews* v. *Swanton, 474*

8. *Same.—Duplicity.*—Under the code, duplicity is not cause for demurrer. *State, ex rel.*, v. *Hawkins, 486*

9. *Payment.—Sheriff's Sale.—Action on Sheriff's Bond.*—A plea of payment is a relevant and proper defence to an action against a sheriff to recover a surplus remaining in his hands from the proceeds of a sale of property on an execution against the plaintiff; and it is error to give judgment for the plaintiff as for a failure of the defendant to answer, when such plea is on file. *State, ex rel.*, v. *Early, 540*

10. *Same.*—A plea of payment need not state to whom the payment was made. *Ib.*

11. *Specific Allegations of Title Control.*—Where a pleading contains both general and specific allegations of title, the specific control, and, if they show no title, they will not be aided on demurrer by the general allegations and the conclusion. *Boesker* v. *Pickett, 554*

12. *Counter-Claim.—Practice.*—A pleading filed as an answer, and bad as such, may, if its averments are sufficient, be treated as a counter-claim. *Porter* v. *Reid*, 562

13. *Partial Defence.*—A partial defence pleaded as an entire defence is insufficient on demurrer. *Johnson School Tp.* v. *Citizens Bank*, 515

POSSESSION.

See INSANITY, 3; REAL ESTATE, ACTION TO RECOVER, 4 to 6; SHERIFF'S SALE, 15.

PRACTICE.

See ARBITRATION AND AWARD; ASSIGNMENT OF ERROR; ATTACHMENT, 1, 2, 4 to 8; BILL OF EXCEPTIONS; COUNTY AUDITOR, 2; CRIMINAL LAW, 16; DEMURRER TO EVIDENCE; DRAINAGE, 3; EVIDENCE, 7; INSTRUCTIONS; JUDGMENT, 6, 7; JURY; JUSTICE OF THE PEACE, 3; MORTGAGE, 6; NEW TRIAL; PLEADING, 3, 6, 9, 12; PROMISSORY NOTE, 1, 3, 13, 16; RAILROAD, 5; REFEREE; REVIEW OF JUDGMENT; SPECIAL FINDING; SUPERIOR COURTS; SUPREME COURT; TAXES, 12; TOWNSHIP TRUSTEE, 3; VERDICT; WITNESS.

1. *Instruction.—Directing Verdict.—Jury.*—The court may, in a proper case, when the evidence is all in, direct the jury to find a verdict in favor of the party entitled to it. *Washer* v. *Allensville, etc., T. P. Co.*, 78

2. *Construing Evidence.—New Trial.—Witness.*—Upon a motion for a new trial, challenging the sufficiency of the evidence, a court is authorised to give a construction to the testimony of witnesses which it may not do when giving the cause to the jury. *Pancake* v. *State*, 93

3. *Reserved Question of Law.—Appeal to Supreme Court.—Statute Construed.*—A reserved question of law can not be presented under section 630, R. S. 1881, unless it appears that the particular question virtually arose, and was decided by the trial court, during the progress of the cause. *Short* v. *Stutsman*, 115

4. *Same.—Exception.—Instruction.—Record.*—A party can not formulate such question of law as he conceives to be involved in the pleading or to arise upon the facts proved, and present it to the Supreme Court under said section 630; and where such question arises upon an instruction, the record must contain the instruction, and it must appear that an exception was taken to the ruling of the court. *Ib.*

5. *Exception to Judgment.*—A general exception to a judgment does not bring in question the correctness of a particular part of the judgment. *Mugge* v. *Helgemeier*, 121

6. *Evidence.—Exception.*—An objection to the admission of evidence must be stated and an exception reserved in the trial court, to present the question of its admissibility in the Supreme Court. *Rotan* v. *Stoeber*, 145

7. *Same.—Witness.—Hearsay.*—Where, on cross-examination of a witness, it appears that all he knew about what he had testified was hearsay, it is proper for the court, on motion, to strike out his testimony. *Ib.*

8. *Special Finding.—Harmless Error.—Record.*—Where it appears from the whole record that a particular fact was not really in dispute on the trial, but treated as admitted, it is not essential that the court should, in a special finding of the facts under section 551, R. S. 1881, state such fact. *Towell* v. *Hollweg*, 154

9. *Objection to Evidence.*—No other objections to the admission of evidence than those stated to the trial court will be considered on appeal. *Sloan* v. *Sewell*, 180

10. *Evidence Offered.—Exception.*—An exception to the ruling of the court in allowing a party to "offer" certain evidence, is meant to include the putting in of the evidence. *Ansley* v. *Meikle*, 200

11. *Objections and Exceptions.—Presumption.*—The specific grounds of objec-

tion to any action or ruling of the trial court must be stated (and exceptions taken) at the time, and not left to inference from a general history of the proceedings; the presumption being in favor of such court until error is plainly shown by the record made up in accordance with the rules of practice. *Railsback* v. *Walke*, 409

12. *Same.—Filing of Papers Without Attention of Court.—Affidavit for Change of Venue.*—Parties have no right in open court, to file an affidavit for change of venue or other paper, without calling the attention of the court thereto. *Quære*, whether an affidavit for a change from the judge can be so interposed as to prevent the announcement of a decision on a matter already considered, the judge being in the act of making the announcement. *Ib.*

13. *Verdict.*—Objection to the sufficiency of a reply comes too late after verdict. *Andrews* v. *Swanton*, 474

14. *Pleading.—Demurrer.—Evidence.*—When considering the correctness of a ruling upon a demurrer, the facts averred, unaided by reference to the evidence, must be considered. *Godfrey* v. *Craycraft*, 476

15. *Pleading.—Partial Defence.*—A partial defence pleaded as an entire defence is insufficient on demurrer.
Johnson School Tp. v. *Citizens Bank*, 515

16. *Same.—Demurrer.—Defect of Parties.*—A demurrer for want of facts, and for want of the plaintiff's capacity to sue, presents no question as to a defect of parties. *Ib.*

17. *Pleading.—Uncertainty.*—Mere uncertainty in a pleading is not reached by demurrer, but by motion to make specific.
Grand Rapids, etc., R. R. Co. v. *Jones*, 523

PRESUMPTION.

See Arbitration and Award, 3; Contract, 5; County Order, 1; Mortgage, 1; Practice, 11; Real Estate, Action to Recover, 6; Sheriff's Sale, 14, 20; Slander, 2; Statute of Frauds; Will, 4, 5.

PRICE, INADEQUACY OF.

See Sheriff's Sale, 7.

PRINCIPAL AND AGENT.

See Bankruptcy; Corporations, 5; Criminal Law, 17, 18; Former Adjudication, 2; Insurance, 11; Railroad, 1 to 4.

1. *Declarations.—Evidence.*—Agency can not, in a suit against the principal, be proven by the declarations of the agent.
Johnston Harvester Co. v. *Bartley*, 406

2. *Ratification.*—The unauthorized act of an agent, or of one assuming to act as an agent, can not be accepted in part and rejected in part.
State, ex rel., v. *Early*, 540

3. *Sheriff.—Payment to Clerk of Court.—Attorney.—Ratification.*—To an action against the sheriff for the recovery of an alleged surplus remaining in his hands from the sale of plaintiff's property on execution, it is a good defence that the sheriff had paid the money to the clerk of the court, to whom the attorneys of record of the plaintiff, "thereunto duly authorized," had receipted for parts of the money, and the remainder, with the plaintiff's consent, had been applied by the clerk to costs taxed against the plaintiff; such facts show a ratification of the act of the sheriff in the disposition of the surplus. *Ib.*

PRINCIPAL AND SURETY.

See Appeal Bond; County Clerk, 4; Decedents' Estates, 1; Guardian and Ward, 1 to 4; Partnership; Promissory Note, 8, 11 12; Township Trustee, 4 to 7.

PROMISSORY NOTE.

See COUNTY ORDER, 1; DECEDENTS' ESTATES, 3; FORMER ADJUDICATION, 2; TOWNSHIP TRUSTEE, 8; VENDOR AND PURCHASER, 3.

1. *Non Est Factum.—Evidence.—Practice.*—In an action upon a promissory note, where the defendant pleads *non est factum*, *prima facie* evidence of the execution of the note entitles it to be read in evidence.
Rotan v. *Stocker*, 147

2. *Payable to Bank Cashier.—Change of Cashier.—Right of Action.—Party.*—A promissory note, made payable to the cashier of a bank, is in effect payable to the bank, and an action may be brought in the name of a successor to the cashier named, without an assignment by the latter, who need not be made a party. *Dutch* v. *Boyd*, 149

3. *Principal and Surety.—Extension of Time.—Principal's Insolvency.—Evidence.—Payee's Knowledge.—Witness.*—On trial of an action on a note against principal and surety, wherein the surety has answered an extension of time, a question to the payee, a witness, asking his reason for not giving an extension, and his answer thereto that he knew of the principal's insolvency, were relevant, competent and material.
Thompson v. *Boden*, 170

4. *Contract.—Payment of Note in Services.—Demand.*—When a note for the payment of money on a day fixed contains a stipulation that payment may be made before maturity in sawing lumber at a named price, the payee to furnish the logs therefor, the payor may give notice of his readiness to perform accordingly, and request that the logs be produced, and a failure of the payee to do so will excuse performance on the part of the payor; and the payee can not demand money without showing that he furnished logs and requested the payor to saw them.
Nipp v. *Dickey*, 214

5. *Same.—Tender.*—A stipulation in a note that it may be paid in specific articles of property or in work or labor is for the benefit of the payor, and he may, as he elects, pay either in property or labor, and if he make proper tender can compel the creditor to accept payment in the articles or work; but if he fails to duly exercise his election, or make a proper tender when it is necessary, the creditor may enforce payment in money. *Ib.*

6. *Same.—Alteration.—Spoliation.*—The alteration of a note by the payee, whereby it is made payable at a bank in this State, is material and avoids the note, but an alteration by a stranger, or by an agent not having authority, is a mere spoliation, which does not release the parties. *Ballard* v. *Franklin Ins. Co.*, 239

7. *Same.—Fraudulent Alteration.*—A fraudulent alteration by the payee of a promissory note will prevent him from recovering either on the note or on the original consideration. *Ib.*

8. *Pleading.—Consideration.—Irrelevant Averments.—Demurrer.*—A promissory note imports a consideration, and consequently averments in a complaint on such note, concerning the origin and nature of the consideration, are irrelevant and not to be considered on demurrer.
DuPont v. *Beck*, 271

9. *Material Alteration.—Inserting Name of Bank.—Bona Fide Purchaser.*—The maker of a promissory note, perfect in its terms, not negotiable by the law merchant, does not, by leaving a blank space in the body of the note, wherein words of negotiability may be so inserted as not to furnish an indication of the alteration, give an implied authority to the payee to insert therein the name of a bank; and such an insertion, without the authority of the maker, is such a material alteration of the note as will invalidate it in the hands of a *bona fide* purchaser, whether he has notice of the alteration or not.
Cronkhite v. *Nebeker*, 319

10. *Same.—Sale and Purchase of.—Purchaser Put upon Enquiry.*—The purchaser of a note, whether negotiable by the law merchant or not, is put upon enquiry as to its genuineness in all its material parts, by the mere fact that it is offered for sale; and if he omits to make enquiry of the maker, he buys at his own risk, and upon the faith of his immediate endorser, or of others, if any, to whom he may legally have recourse. *Ib.*

11. *Principal and Surety.—Payment.—Mistake.—Forgery.*—Where by a forgery of the signature of his former surety to a promissory note, the principal in a note discounted at bank deceives the bank and obtains a renewal of the loan, and a surrender of the old note, and delivers it to the surety as paid and thereby induces him to believe that it has been paid, the truth coming to his knowledge only after the principal has become insolvent and absconded, the bank may recover from the surety, upon the old note, upon the ground that it was surrendered by mistake. *Lovinger v. Nat'l Bank, etc., 364*

12. *Same.—Renewal of Note by Forged Note.—Payment of Interest.—Discharge of Surety.*—A renewal of a loan by the use of a forged note, whereby the lender is deceived, interest being paid for the period in advance, is not binding upon the latter, and therefore will not discharge a surety for the original loan. *Ib.*

13. *Same.—Admission in Complaint.—Evidence.—Payment.*—Under a plea of payment to an action on a promissory note, it is competent for the plaintiff to show that a credit admitted in the complaint is for the same payment evidenced by a receipt produced by the defendant. *Robertson v. Garshwiler, 483*

14. *Interest.—Payment.—Recoupment.*—A promissory note, without any express stipulation for interest, draws six per cent. after maturity; and, payments made having been credited on the basis of ten per cent., without the maker's consent, he had the right to have the calculation made on the basis of six per cent. In such case, it is not a question of recoupment, but of payment. *Godfrey v. Craycraft, 476*

15. *What is.—Form.—School Township.—Township Trustee.—Descriptio Personæ.*—An instrument may be a promissory note though it contains no direct "promise to pay," if it have equivalent words; for instance, a writing of the following tenor: This is to certify that there is due from Johnson Township, to A. and B., or order, one hundred dollars for school furniture, payable on, etc., with interest, etc., for value received, etc.; payable at the First National Bank, etc.; signed W. H. F., "Trustee Johnson Township," is the promissory note of Johnson School Township. *Johnson School Tp. v. Citizens Bank, 515*

16. *Same.—Pleading.—Copies.—Practice.—Exhibits.*—A complaint of two paragraphs, upon two promissory notes of identical tenor, must be accompanied with a copy of each note, filed with its proper paragraph. It is not enough to put in place of a copy of either note a statement of its identity with the other exhibit. *Ib.*

17. *Mortgage on Real Estate.—Suit by Assignee against Indorser.—Due Diligence.—Insolvency of Maker.—Defence.*—Under section 5504, R. S. 1881, the assignee of promissory notes, not payable to order or bearer in a bank in this State, and secured by mortgage on real estate, having used due diligence in the premises, or where, by reason of the insolvency of the maker of the notes, due diligence would have been unavailing, may have his action against his immediate or any remote indorser of the notes, for any balance due or to become due thereon after the sale of the mortgaged premises; and it is no defence to such action that the mortgaged premises depreciated in value between the time when the assignee might have enforced, and the time when he did enforce, the sale of said premises. *Wilson v. Binford, 588*

18. *Same.—Assignor's Contract.—Warranty.—Sale of Mortgaged Premises.—Application of Proceeds.*—The contract of the assignor or indorser of a promissory note, negotiable under the statute of this State, but not governed by the law merchant, is a warranty that the maker is liable on the note and able to pay it. Upon the sale of mortgaged premises, the proceeds of the sale shall be applied, under section 639 of the civil code of 1852 (sec. 1104, R. S. 1881), first to the payment of the principal due, interest and costs, and then to the residue secured by the mortgage and not due; and an answer of the assignor, seeking a different application of the proceeds of sale from that prescribed in the statute, is bad on demurrer for the want of facts. *Ib.*

19. *Same.—Want of Diligence.—Notes not Due.*—The assignee's failure to use due diligence in the prosecution of his judgment against the maker upon the notes then due, is no defence in the suit against the assignor upon the notes which afterwards became due. *Ib.*

20. *Same.—Assignment of Mortgage Notes.—Judgment of Foreclosure.—Merger.*—In the judgment recovered by the assignee of notes secured by mortgage, against the maker thereof, for the foreclosure of the mortgage, there is no merger of the assignor's contract of assignment. *Ib.*

PROSECUTING ATTORNEY.

See COUNTY CLERK, 2.

PUBLIC POLICY.

See TAXES, 8.

PUBLICATION.

See CRIMINAL LAW, 6, 7.

PUBLICATION OF DELINQUENT TAX LIST.

See CONSTITUTIONAL LAW, 1.

QUESTION OF FACT.

See EXECUTION, 3; LIQUOR LAW, 2; NEGLIGENCE, 5.

QUESTION OF LAW.

See CRIMINAL LAW, 16; PRACTICE, 3, 4.

QUO WARRANTO.

See CORPORATIONS, 3, 4; ELECTIONS; TURNPIKE COMPANY, 6.

RAILROAD.

See CRIMINAL LAW, 1, 2; NEGLIGENCE, 2 to 4.

1. *Railroad Company.—Liability for Wilful Acts and Torts of Agents and Servants.—Corporation.—Principal and Agent.—Ratification.*—A corporation is liable for the wilful acts and torts of its agents, done to the injury of others, within the general scope of their employment, though the particular acts had not been previously authorized, and have not been ratified since, by the corporation. *Terre Haute, etc., R. R. Co.* v. *Jackson*, 19

2. *Same.—Contract with Passenger.—Breach.—Negligence.*—The contract of a railway company with its passenger is to carry safely; and if, through the negligence or wilful act of the conductor or of a brakeman, or of both, a jet of water is dashed upon the passenger while being carried, it is a breach of the contract. *Ib.*

3. *Same.—Evidence.—Previous Declaration of Servant.*—It being charged in the complaint that plaintiff, while being carried on the defendant's railroad, was drenched with water, and that it was done wilfully, and the evidence tending to show that it was done by the direct procurement of the brakeman, it was competent to prove a previous declaration of the brakeman of his purpose to do it. *Ib.*

4. *Same.—Evidence of Injury.*—In an action against a railroad company for having wrongfully drenched the plaintiff, while a passenger, with water, it being specially charged that the injury caused a recurrence of dizziness and vertigo, it was competent, without offering medical testimony on the subject, to prove, among instances of such dizziness after the injury, the falling of the plaintiff upon a sidewalk. *Ib.*

5. *Appeal.—County Commissioners.—Practice.*—An appeal from the order of a county board levying a tax in aid of a railroad goes to the circuit court, not for the correction of errors, but for trial as an original cause; objections filed there, in the nature of an assignment of errors, should be wholly disregarded, and the party appealing can make no question in the Supreme Court concerning the ruling of the circuit court upon them. *Gavin* v. *Board, etc., 480*

6. *Tax.—Public Aid.—Evidence.*—In July, 1879, a petition was presented to the county board asking an appropriation for a township of $75,000, to aid a railroad, as provided by the statute (R. S. 1881, sec. 4045). An election was held and the appropriation voted. In June, 1880, the board levied a tax of one per cent. accordingly. In June, 1881, another levy of one per cent. was ordered, and on trial of an appeal from this last order the appellant offered to prove that a tax of one per cent. for the years 1880 and 1881 would not raise the $75,000.

Held, that the evidence was immaterial.

Held, also, that the appeal raised no question upon the proceedings occurring before the order appealed from. *Ib.*

7. *Fences.—Cattle-Pits.*—When a railroad company makes gates in its fences to enable a farmer, whose lands lie on both sides, to pass and repass, and does not protect the crossing by cattle-pits, the railroad is not securely fenced, as the statute (R. S. 1881, section 4031) requires. *Grand Rapids, etc., R. R. Co.* v. *Jones, 623*

8. *Same.—Stock Killed.—Negligence.—Evidence.*—There is no question of negligence by either party, nor of motive for not securely fencing, involved in a suit for animals killed, under the statute requiring railroads to be fenced, and it is not error to exclude evidence upon these subjects. *Ib.*

RAILROAD TICKETS.

See CRIMINAL LAW, 1, 2.

RATIFICATION.

See CONTRACT, 8; CORPORATIONS, 5; PRINCIPAL AND AGENT, 2, 3; RAILROAD, 1; SHERIFF, 2.

REAL ESTATE, ACTION TO QUIET TITLE.

See CITY, 1.

REAL ESTATE, ACTION TO RECOVER.

See MARRIED WOMAN, 4; RECEIVER, 2; SHERIFF'S SALE, 13, 15, 20.

1. *Complaint.—Description of Premises.—Presumption.*—If the description of the premises in a complaint in ejectment contains no apparent uncertainty, the pleading will be upheld on demurrer. The court will not indulge in conjecture, or in the presumption of facts not stated, for the purpose of making the description uncertain. *Railsback* v. *Walke, 409*

2. *Same.—Answer.—Lease.—Statute of Frauds.*—An answer to a complaint in ejectment in the usual form, to the effect that the defendant had been the owner and in possession, but had been sold out by the sheriff, and that, in consideration of the surrender by the defendant of an obligation which he held against the purchaser, the latter had leased

the land to the defendant for the period of five years, and that he had been in possession and had cultivated the land for one year only, is not good, because of the statute of frauds which requires leases for more than three years to be in writing. *Ib.*

3. *Same.—Landlord and Tenant.*—A special answer, to a complaint in ejectment, which sets up a right to occupy as tenant, must show that the tenancy had not been terminated before the commencement of the action. *Ib.*

4. *Same.—Part Performance.—Consideration.*—The remaining of a party in possession, under a parol lease of land for more than three years, payment of the consideration of the lease and cultivation of the land, are not such part performance as to take the contract out of the statute. *Ib.*

5. *Same.—Parol Lease for more than Three Years.*—The tenant who takes possession under a parol lease for a term longer than three years, is not a trespasser, but, *it seems*, a tenant from year to year. *Ib.*

6. *Title.—Possession.—Evidence.—Heir.—Descent.—Presumption of Conveyance by Ancestor.*—In an action to recover the possession of real estate, the defendant in possession, unable to show title in himself, may protect his possession and defeat the action by proving facts and circumstances from which it may be fairly inferred that the ancestor, under whom the plaintiff claims as heir, had in his lifetime parted with the title to the land, so that the plaintiff inherited nothing therein. *Hagenbuck* v. *McCluskey*, 577

RECEIVER.

See FRAUD.

1. *Application for Appointment of.—Pleading.*—A petition for the appointment of a receiver must show affirmatively the facts which make the receiver necessary. It will not be sufficient to allege ignorance of material facts nor to allege a legal conclusion without stating the facts on which it is predicated. *Hamilton* v. *Farmers Bank*, 249

2. *Same.—Real Estate, Action to Recover.—Averments of Title in Petition for Receiver.*—Where, in an action for the recovery of real estate, a petition by the plaintiff for the appointment of a receiver is filed, averring the plaintiff's ownership of a junior judgment and his redemption from the foreclosure sale made by the defendant, the allegation of title that the "plaintiff afterwards took such other steps as required by law, as that, on," etc., "and after due and legal sheriff's sale of said real estate," a deed therefor was by the sheriff executed to him, is insufficient. *Ib.*

RECITALS.

See CITY, 2.

RECOGNIZANCE.

See BASTARDY; CRIMINAL LAW, 8; REPLEVIN BAIL.

1. *Recognizance Bond.—Complaint.*—A complaint upon a forfeited recognizance must state facts showing that the officer, by whom bail was accepted, had authority to take it. *State* v. *Wissinger*, 51

2. *Same.—When Void.—Jurisdiction.*—A recognizance taken by a court without jurisdiction, or by an officer without authority, is void. *Ib.*

3. *Constable.—Taking Recognizance.—Statute Construed.*—Fixing the amount of a recognizance in cases of felony, is a judicial act which a constable has no authority to perform; nor does section 1705, R. S. 1881, confer upon him authority to take recognizances in such cases without a judicial order fixing the amount, or directing that bail may be taken; and a bond so taken, without such order, is void, and subsequent acts of the court can not validate it, nor is it such a defect as is cured by section 1221. *Ib.*

RECORD.

See ATTACHMENT, 2; BILL OF EXCEPTIONS; EVIDENCE, 6, 7; NEW TRIAL, 2; PRACTICE, 4, 8; SUPREME COURT, 2, 19.

RECOUPMENT.

See PROMISSORY NOTE, 14.

REDEMPTION.

See EMBLEMENTS; MARRIED WOMAN, 2; SHERIFF'S SALE, 15, 16, 19; VOLUNTARY ASSIGNMENT.

REFEREE.

See COUNTY AUDITOR, 2.

Venire de Novo.—New Trial.—Exception.—Practice.—Where a referee, under order, reports the facts and his conclusions thereon, an insufficiency in the facts found, by omission or uncertainty in the conclusions appearing in the report, is reached, not by motion for a *venire de novo*, but by motion for a new trial; and the conclusions may be questioned only by exceptions thereto. *Gaunt* v. *State, ex rel.*, *157*

REFORMATION OF JUDGMENT.

See JUDGMENT, 4.

RELEASE OF SURETY.

See APPEAL BOND; PROMISSORY NOTE, 3, 12.

REPEAL OF STATUTE.

See CONSTITUTIONAL LAW, 1; COUNTY CLERK, 3; CIRCUIT COURTS, 1.

REPLEVIN.

See EXECUTION, 2; INSANITY, 3.

REPLEVIN BAIL.

See BASTARDY.

Defects Cured.—Bastardy.—Following a judgment in the usual form against the defendant in bastardy, there was a recognizance of replevin bail, not attested or approved by the clerk, but in the form prescribed by statute, save that the word "security" was used instead of "bail."

Held, that it was made good by section 1221, R. S. 1881, and applied to the judgment in gross. *McAllister* v. *State, ex rel.*, *256*

RES ADJUDICATA.

See FORMER ADJUDICATION; INJUNCTION BOND, 1; PARTITION.

RESCISSION.

See CONTRACT, 3; EXECUTION, 4; FRAUD.

RESERVED QUESTION OF LAW.

See CRIMINAL LAW, 16; PRACTICE, 3, 4.

REVIEW OF JUDGMENT.

1. *Default.—Waiver of Objection.—Practice.*—A complaint to review a judgment for error appearing by the record thereof is, in effect, the same as an appeal to the Supreme Court, and no error, not available upon appeal, can be reached thereby. If a judgment be taken by default without exception, and upon due notice, he must first apply, in the cause, for relief from error, else his assent thereto will be inferred, and he can raise no question by review. *Tuchau* v. *Fiedelday*, *54*

2. *Same.—Complaint.*—Less than the whole complaint can not be attacked for insufficiency for the first time by complaint to review. *Ib.*

SALE.

See CITY; CONTRACT, 1, 7; CRIMINAL LAW, 19; EXECUTION, 4; GUARDIAN AND WARD, 1; JUDGMENT, 3, 4; LIQUOR LAW; MARRIED WOMAN; PLEADING, 9; PROMISSORY NOTE, 10, 18; SHERIFF'S SALE; TAXES.

SCHOOL LAW.

See COUNTY ORDER, 2; PROMISSORY NOTE, 15; TOWNSHIP TRUSTEE, 8.

SET-OFF.

See COUNTY ORDER, 3; GUARDIAN AND WARD, 2.

Guardian.—An individual obligation of a guardian can not be set off against a cause of action held by him as guardian.

Robertson v. *Gorshuiler*, 463

SHERIFF.

See FEES AND SALARIES; PLEADING, 9; PRINCIPAL AND AGENT, 3; SHERIFF'S SALE; SUMMONS.

1. *Pleading.—Sheriff's Bond.—Answer.—Direction Not to Levy.*—Complaint on a sheriff's bond, stating for breach: 1. Failure to levy an execution; 2. Refusal to levy on personal property when directed, and levying on real estate encumbered beyond its value. Answer, that the sheriff, being about to levy the execution on personal property, was directed by the execution plaintiff not to make such levy, but to levy upon the real estate of the execution defendant, which was accordingly done.

Held, that the answer was good on demurrer. *State, ex rel.*, v. *Hawkins*, 486

2. *Payment to Clerk of Court.—Ratification.*—To an action against the sheriff for the recovery of an alleged surplus remaining in his hands from the sale of the plaintiff's property on execution, it is a good defence that the sheriff had paid the money to the clerk of the court to whom the attorneys of record of the plaintiff, "thereunto duly authorized," had receipted for parts of the money, and the remainder, with the plaintiff's consent, had been applied by the clerk to costs taxed against the plaintiff; such facts show a ratification of the act of the sheriff in the disposition of the surplus. *State, ex rel.*, v. *Early*, 540

SHERIFF'S SALE.

See EMBLEMENTS; JUDGMENT, 3, 4; MARRIED WOMAN; PLEADING, 9; RECEIVER; VENDOR AND PURCHASER, 5.

1. *Pleading.—Husband and Wife.—Action to Quiet Title.*—A complaint by two, not shown to be husband and wife, to quiet their title to land against an alleged illegal and void sale made by a sheriff under an execution against one of them, presents no issue except the validity of the sale, and does not require a determination of the rights in the land of one of them as the wife of the other. *Mugge* v. *Helgemeier*, 120

2. *Same.—Reply.—Departure.*—In an action to set aside a sheriff's sale, a reply which sets up different irregularities from those alleged in the complaint, is a departure. *Ib.*

3. *Same.—Execution.—Appraisement.*—Under an execution upon a judgment, a part of which is directed to be collected without appraisement, a sale without appraisement is proper. *Ib.*

4. *Same.—Real Estate Fraudulently Conveyed.*—Real estate, which the debtor has conveyed or caused to be conveyed with intent to defraud his creditors, may be sold without appraisement on an execution which does not waive appraisement, there having been an adjudication that the conveyance was fraudulent, although the adjudication contain no express order for sale without appraisement. *Ib.*

5. *Same.—Statute Construed.*—Section 381, code of 1852 (R. S. 1881, section 576), does not apply to the sale on execution of real estate fraudulently conveyed by the execution debtor. *Ib.*

6. *Same.—Separate Parcels.—Sale in Solido.*—When the real estate consists of separate parcels, and the rents and profits and the fee simple of the parcels, singly and in combinations of two, three, etc., have been properly offered and no bids received, the parcels may be all offered and sold together. *Ib.*

7. *Same.—Inadequacy of Price.—Supreme Court.*—When the offer has been properly made to sell in parcels and in combinations of parcels, and then they are all sold together, this court will not, on account of alleged inadequacy of price, review the finding and judgment of the lower court upholding the sale of real estate by a sheriff. *Ib.*

8. *Action to Set Aside.—Pleading.—Notice.*—A complaint to set aside a sheriff's sale of real estate on execution, against a vendee of the purchaser, on the ground that the execution defendant's personal property was not first exhausted, and that the real estate sold should have been subdivided and a part only sold, is bad on demurrer, if it do not show that the sheriff had knowledge of the personal property or by reasonable diligence could have discovered it, and that it was within reach of the execution, and was so unencumbered that its sale would have yielded something, and that the vendee had notice of the irregularities. *Nelson* v. *Bronnenburg, 193*

9. *Same.—Sale in Parcels.*—Whenever it is doubtful whether real estate levied on is legally susceptible of division, the action of the sheriff, taken in good faith and without abuse of discretion, is conclusive. *Ib.*

10. *Same.—Division.*—It is doubtful whether, in selling an undivided share of real estate on execution, a sheriff has power to subdivide such share and sell less than the whole of it. *Ib.*

11. *Same.—Sale in Solido.—Limitation of Action to Set Aside.*—A sheriff's sale of real estate *in solido*, which should have been sold in parcels, is not void but voidable, and proceedings to set it aside must be brought within a reasonable time—and *it seems* that this must be done within the year allowed for redemption, unless excuse be shown for the delay. *Ib.*

12. *Judgment.—Evidence.*—A judgment or decree of a competent court, valid upon its face, is *prima facie* sufficient to support a judicial sale made upon it. *Woolen* v. *Rockafeller, 308*

13. *Same.—Title.—Real Estate, Action to Recover.*—A judgment of a court of superior jurisdiction (without the complaint and pleadings), execution and return of sale of land, and sheriff's deed in accordance with such return, are sufficient to show title in the purchaser against a party claiming title derived from the judgment defendant. *Ib.*

14. *Same.—Sheriff's Return of Sale.—Notice.—Presumption.*—A sheriff's return of sale of real estate on execution showed the proper posting of notices of the sale in M. township, without stating that the land was in that township.

Held, the contrary not appearing, that it would be presumed that the sheriff discharged his duty as to the notice. *Ib.*

15. *Redemption.—Redemptioner.—Real Estate, Action to Recover.—Possession.—Mortgage.*—In ejectment, a purchaser at sheriff's sale, from which redemption has been made under the statute, is not entitled to possession upon the ground that he had redeemed from a sale made upon a senior mortgage. His right as such redemptioner is not to possession of the lands, but to a lien thereon for his redemption money and interest, which he may enforce by suit for its recovery. *Rice* v. *Puett, 230*

16. *Same.—Owner of Equitable Title May Redeem.—Mortgage.—Notice.*—One who has an equitable title only to the right of redemption might, under the statute of 1879, Acts 1879, p. 176, redeem lands from a sheriff's sale upon a decree foreclosing a mortgage, and the fact of his having

paid the money to redeem was notice to the purchaser at sheriff's sale of the facts upon which his right to redeem was based. *Ib.*

17. *Same. Mistake.—Description.*—One who had purchased and paid for the mortgagor's title and taken a deed which, by mistake, did not describe the land, might, under the act of 1879, redeem from a sheriff's sale upon a decree foreclosing a mortgage. *Ib.*

18. *Real Estate.—Growing Crops.—Landlord and Tenant.—Judgment Lien.—Mortgage Lien.*—A tenant who sows crops on land subject to a judgment lien may claim them against a purchaser at a subsequent sheriff's sale, and this rule applies to land under the lien of a mortgage which creates no estate in the mortgagee. *Hazelton* v. *Farmers Bank*, 249

19. *Same.—Landlord's Share of Crops of Land Sold on Execution.—Redemption.*—The purchaser at sheriff's sale on foreclosure or upon execution gets only the landlord's share, at most, in the crops upon the land, when he obtains title; otherwise, if the crops were planted after the sale and during the year for redemption. *Ib.*

20. *Appraisers.—Sale in Solido.—Return on Execution.—Evidence.—Real Estate, Action to Recover.—Presumption.*—A sheriff's return to an execution, showing the sale of real estate, subject to appraisement, is not materially defective for a failure to show how the appraisers were selected; nor for a failure to show that separate parcels of land sold in *solido* were first offered separately. Where the return is silent as to such matters the presumption will be indulged, *prima facie*, that the sheriff did his duty concerning them. Such return is admissible in evidence in ejectment to prove title in the purchaser.
Ferrier v. *Deutchman*, 390

21. *Same.—Sheriff's Deed.*—A sheriff's certificate of sale of real estate is not ordinarily material evidence in support of the purchaser's title, but the deed is admissible if it rests on a valid return. *Ib.*

SIGNATURE.

See CRIMINAL LAW, 7; TURNPIKE COMPANY, 6; WILL, 1 to 6.

SLANDER.

1. *Actionable Words.—Pleading.—Inducement and Innuendo.*—Words spoken of an unmarried woman which are intended to convey, and do convey, to the mind of the hearer, the meaning that she was guilty of fornication, are slanderous and actionable; and when the allegations of the complaint, in an action for slander, show, by the inducement and innuendo, that the words charged to have been spoken meant, and were intended to mean, that the plaintiff had been guilty of fornication, such complaint shows that the words were uttered slanderously, and are actionable. *Branstetter* v. *Dorrough*, 527

2. *Same.—Malice.—Presumption.—Instruction.*—Where, in an action for slander, justification is not pleaded, it is not error to instruct, that if the defendant spoke the words charged, intending and being understood to impute fornication as charged, the law will presume malice. *Ib.*

3. *Same.—Repeating Slanderous Charges.*—It is actionable to repeat in good faith slanderous words concerning another, on an occasion not privileged, though at the same time a disbelief in their truth be expressed, and the purpose of the repetition be to obtain advice as to the propriety of informing the plaintiff of the charges. *Ib.*

SPECIAL FINDING.

See COUNTY AUDITOR, 2; MORTGAGE, 6; PRACTICE, 8.

Practice.—When the court finds the facts specially, stating separately its conclusions of law thereon, a party by excepting to the conclusions does not lose the right to move for a new trial. *Bertelson* v. *Bower*, 512

SPECIAL VERDICT.

See SUPREME COURT, 9; VERDICT.

SPECIFIC PERFORMANCE.

1. *Contract for Sale of Land.—Complaint.—Title of Deceased Vendor.*—A complaint against the heirs of a deceased vendor, for a specific performance of his parol contract, need not allege that the ancestor had any title to the property which he agreed to convey. *Cottrell* v. *Cottrell, 87*

2. *Title Bond.—Contract.—Mistake.—Statute of Limitations.—Waiver.—Vendor and Purchaser.*—Suit to compel a conveyance according to the conditions of a title bond. Cross complaint averring that the purchase-money was unpaid, alleging that a recital in the bond of payment was a mistake, and that the purchaser and her assignee were in possession, praying for a correction of the mistake, that an account be taken of the purchase-money due, and on payment that a conveyance be made by a commissioner, and for general relief. Answer to the cross complaint, the statute of limitations.

Held, that the cross complaint was good on demurrer, and the answer bad.

Held, also, that plaintiff, by suing for specific performance, waived the statute. *Hamilton* v. *Plaut, 417*

3. *Same.—Estoppel.*—The recital of payment in a title bond for a deed for the purchase of real estate does not estop the obligor from averring, in a suit for a deed, the non-payment of the purchase-money. *Ib.*

SPOLIATION.

See PROMISSORY NOTE, 6.

STATE-HOUSE COMMISSIONERS.

State-House.—Statute Construed.—The new State-House is, by the act of 1877 (Acts 1877, Spec. Sess., p. 68), required not to cost for its construction more than $2,000,000, but this does not include incidental expenses, such as salaries, travelling expenses of the board and rents; and the board has authority to expend that sum for construction alone. *Board, etc.*, v. *Whittaker, 297*

STATUTE CONSTRUED.

See CONSTITUTIONAL LAW, 2, 3, 4; COUNTY CLERK, 2, 3; CIRCUIT COURTS; CRIMINAL LAW, 1, 8, 12; ELECTIONS; FEES AND SALARIES; JUDGMENT, 1; MARRIED WOMAN, 1, 3; PRACTICE, 3, 4; RECOGNIZANCE, 3; SHERIFF'S SALE, 5; STATE-HOUSE COMMISSIONERS; TAXES, 15; TURNPIKE COMPANY, 4; VENDOR AND PURCHASER, 1; WILL, 4.

STATUTE OF FRAUDS.

See CONTRACT, 1, 2; MORTGAGE, 2; REAL ESTATE, ACTION TO RECOVER, 2, 4.

Contract for Purchase of Real Estate.—Description.—Presumption.—A contract recited that "The parties of the first part having conveyed certain lands" (not described, except in a certain township and county in Indiana), "in part, agree to have the same completed within twenty days, or pay to the parties of the second part $500; and the parties of the second part agree to comply *with the contract* on completion of the deeds, or pay to the parties of the first part $500."

Held, in an action thereon, that the agreement was within the statute of frauds, the land not being so described as to be capable of identification, and the presumption being that the *contract* referred to was in parol. *Pulse* v. *Miller, 190*

STATUTE OF LIMITATIONS.

See COUNTY CLERK, 4; CRIMINAL LAW, 19; GUARDIAN AND WARD, 4; LIQUOR LAW, 3; SHERIFF'S SALE, 11; SPECIFIC PERFORMANCE, 2; TAXES, 10 to 12; TOWNSHIP TRUSTEE, 2, 3.

STENOGRAPHER.

See BILL OF EXCEPTIONS, 2.

STREET.

See CITY; NEGLIGENCE, 4.

SUMMONS.

See ATTACHMENT, 1 to 3.

Sheriff's Return.—A sheriff's return to process can not be set aside on motion supported by proof that it is false. It can not be thus contradicted. *Johnston Harvester Co.* v. *Bartley, 406*

SUNDAY.

See CRIMINAL LAW, 19; LIQUOR LAW.

SUPERIOR COURTS.

See CONSTITUTIONAL LAW, 4.

1. *Superior Court of Marion County.—Special and General Term.—Appeal to Supreme Court.—Assignment of Errors.*—An appeal will not lie to the Supreme Court from a judgment of the Marion Superior Court at special term, but only from the judgment of that court in general term. Therefore, in such a case, the only proper assignment of error, on appeal to the Supreme Court, is, that the superior court, in general term, had erred in affirming or reversing, as the case might be, the judgment of the court at special term. *Leary* v. *Smith, 90*

2. *Appeals from General Term.—Judgments of Reversal.*—Under the provisions of section 1362, R. S. 1881, appeals will lie to the Supreme Court from judgments of superior courts in general term, reversing or modifying judgments at special term, by any party who has had judgment in his favor at special term. *Dubois* v. *Johnson, 590*

SUPREME COURT.

See APPEAL; ARBITRATION AND AWARD, 3; ASSIGNMENT OF ERROR; ATTACHMENT, 3; BILL OF EXCEPTIONS; CHATTEL MORTGAGE, 5; CONSTITUTIONAL LAW, 2; COSTS; CRIMINAL LAW, 3, 16; DECEDENTS' ESTATES, 3; DIVORCE; EXECUTION, 4; JUDGMENT, 6, 7; NEW TRIAL, 2, 6, 7; PRACTICE, 3 to 6, 8 to 11; RAILROAD, 5; SHERIFF'S SALE, 7; SUPERIOR COURTS.

1. *Assignment of Error.—Dismissal.*—After submission of a cause in the Supreme Court, a motion to dismiss the appeal, for the reason that the names of some of the parties are omitted in the assignment of errors, will fail unless harm has resulted from the omission. *Wilson* v. *Heffin, 35*

2. *New Trial.*—Unless the record elsewhere show the action of the court complained of in a motion for a new trial, no question arises for the decision of the Supreme Court. *Washer* v. *Allensville, etc., T. P. Co., 78*

3. *Exception.—Harmless Ruling.* Where an exception was sustained but not insisted upon in the trial court, and the party secured all the right he was entitled to, this irregularity is not sufficient ground for a reversal. *Louisville, etc., R. R. Co.* v. *Wunderlich, 105*

4. *Same.—Evidence.—New Trial.*—A party complaining of the admission of evidence must state his objections to the trial court, and except to the rulings adverse to him; and if he desires to present a question thereon in the Supreme Court, he must assign such rulings as cause for a new trial, and point out with reasonable certainty the evidence complained of. *Ib.*

5. *Weight of Evidence.*—Where there is evidence in the record, which tends to sustain the finding of the trial court on every material point

in issue, the Supreme Court will not disturb such finding on the weight of the evidence. *French* v. *State, ex rel.*, *151*

6. *Same.—Bill of Exceptions.—Omission of Evidence.*—Although the bill of exceptions concludes with the formula, "this was all the evidence given in the cause," yet if, on the face of the bill, there is an apparent omission of evidence, the Supreme Court will not consider or decide any question which depends, for its proper decision, upon the evidence in the cause. *Ib.*

7. *Joint Assignment of Errors.*—Where a joint demurrer by several to a pleading is overruled, an assignment of error by each separately, that the ruling was erroneous *as to him*, presents no question in the Supreme Court. *Towell* v. *Holtzcy*, *154*

8. *Same.—Complaint.*—The sufficiency of a complaint against two defendants can not be questioned for the first time in the Supreme Court as to its sufficiency as against one only. *Ib.*

9. *Venire de Novo.—Special Verdict.—Harmless Error.*—Where a special verdict is defective, in that it fails to find all the facts necessary to cover the issues, and yet the court below renders such a judgment as would be proper only if the facts not found had been found as the appellant has averred them to be, in his pleadings, he can not complain in the Supreme Court that a *venire de novo* was refused, the error being, in the end, harmless as to him. *Harness* v. *Harness*, *160*

10. *Dismissal.—Waiver.—Parties.*—A motion to dismiss an appeal after submission, on account of the non-joinder of a party defendant in the appeal, and want of notice served, can not prevail; such objections are considered waived by the submission. *Easter* v. *Acklemire*, *165*

11. *Practice.—Objection to Question.—Evidence.*—An objection to a question put to a witness can not be made for the first time in the Supreme Court. *Thompson* v. *Boden*, *176*

12. *Conflicting Evidence.—Verdict.—Preponderance.*—The Supreme Court will not disturb a verdict which is supported by some evidence, however great the preponderance may have been the other way. *Davis* v. *Nicholson*, *193* *Highfill* v. *Monk*, *203*; *Smith* v. *Bissell*, *188*; *English* v. *State, ex rel.*, *455*

13. *Brief.*—Where no brief has been filed by the appellant in the Supreme Court, the appeal will be dismissed. *Schwarm* v. *State*, *247*

14. *New Trial.—Practice.*—The Supreme Court will not reverse a judgment for error in granting a new trial, unless it appears that the action of the court has resulted in manifest injustice to the complaining party. *Waddle* v. *Megee*, *247*

15. *Same.—Newly Discovered Evidence.*—Where a new trial was asked because of newly discovered evidence and for various other reasons, the Supreme Court can not say that the trial court erred in granting such motion, because it should not have been granted for newly discovered evidence. The other reasons may have authorised the court to grant the motion. *Ib.*

16. *Assignment of Error.*—Where a complaint consists of more than one paragraph, the sufficiency of a single paragraph thereof can not be questioned for the first time in the Supreme Court. *Carr* v. *State, ex rel.*, *342*

17. *Immaterial Evidence.—Harmless Error.*—A judgment will not be reversed for error in admitting immaterial evidence, unless it is made to appear that the appellant was in some material respect probably injured thereby. *Lovinger* v. *First Nat'l Bank, etc.*, *354*

18. *Harmless Error.*—Where it affirmatively appears by the record of the whole case that a judgment is right on the merits, it will not be reversed for harmless intermediate errors, such as giving instructions

as to the law of the case, or requiring a general verdict also where a special verdict has been demanded. *Toler* v. *Keiser*, 385

19. *Record.—Allowance to Clerk.*—Where a county clerk presents a claim for special services for a term of court, but offers no evidence in support thereof, and no finding is made that the services were rendered, and the court refuses to allow the claim, no question is presented by the record to the Supreme Court, on appeal. *Ex Parte Mitchell*, 399

20. *Evidence.—Practice.*—Where there is evidence in the record tending to support the finding of the court below, the Supreme Court will not weigh it to determine its sufficiency. *Hackler* v. *State, ex rel.*, 430

21. *Practice.—Waiver.—New Trial.*—Reasons for a new trial covered by a specification in an assignment of error, but not discussed, will be regarded by the Supreme Court as waived. *English* v. *State, ex rel.*, 455

22. *Evidence.—Competency.*—The competency of evidence can not be objected to for the first time in the Supreme Court. *Ib.*

23. *Harmless Error.—Evidence.*—Error in admitting evidence, which it is apparent could not have influenced the verdict, is not available in the Supreme Court. *State, ex rel.*, v. *Hawkins*, 496

24. *Appeal.— Parties.—Trust and Trustee.—Mortgage.*—E., trustee of an express trust created by mortgage, obtained a judgment of foreclosure, and then died. Afterwards the mortgagors appealed, making a party appellee B., who was named in the mortgage as the successor of E. as trustee in case of the death of the latter.

Held, that B. was properly made a party to the appeal. *Losey* v. *Bond*, 510

25. *Reversal on Assignment of Cross Errors.—Practice.*—Where the appellee assigns cross errors occurring prior to those assigned by the appellant, and all the errors assigned are found to exist, the judgment will be reversed at the costs of the appellant. *Porter* v. *Reid*, 669

26. *Practice.—Second Appeal.*—Where a judgment has been reversed and the cause remanded to the court below, and from the proceedings there had a second appeal is taken, such appeal brings before the Supreme Court, for review and decision, nothing but the proceedings subsequent to the reversal; and none of the questions presented and decided on the first appeal can be re-heard or re-examined on the second appeal. *Wilson* v. *Binford*, 585

TAXES.

See CONSTITUTIONAL LAW, 1; COUNTY AUDITOR; COUNTY ORDER, 1, 2; EVIDENCE, 4; RAILROAD, 5, 6.

1. *Tax Sale.—Description of Land Sold.—Enforcement of Lien.*—When the description of the certificate and deed of the real estate sold for delinquent taxes, is such as would enable a competent person to identify and locate the particular land intended to be conveyed, it is sufficient to entitle the purchaser to enforce a lien against the land for the principal, interest and penalty of the sum paid by him. *Sloan* v. *Sewell*, 180

2. *Same.—Imperfect Description.*—The fact that land subject to taxation is imperfectly described will not preclude the purchaser at the tax sale from maintaining an action to enforce a lien against the land intended to be listed and sold. *Ib.*

3. *Same.—Lien Where Owner Has Personal Property.*—The fact, that the owner of real estate sold for delinquent taxes had personal property in the county subject to sale, will not prevent the purchaser from obtaining a lien on the land for the amount paid by him, including interest and penalty. *Ib.*

4. *Tax Sale.—Complaint to Enforce Lien.*—A complaint to enforce a lien against land sold for delinquent taxes for the amount paid by the purchaser at a tax sale, which shows that the real estate owned by the

defendant was subject to taxation, was listed for taxes, was sold for taxes, and purchased by the plaintiff, is sufficient to show that the sale gave the plaintiff a lien for the money paid, and the penalty prescribed by statute; it is not necessary to show a valid sale.
Parker v. *Goddard*, 294

5. *Same.—Defective Description.—Lien.—Evidence.*—Where in such case the evidence shows that the land sold was owned by the defendant, was intended to be listed, that the taxes paid by the plaintiff were intended to be charged against that land, and that they should have been paid by the defendant, a defective description of the real estate will not defeat the lien. *Ib.*

6. *Complaint to Enjoin Execution of Deed for Land Sold.*—A complaint to enjoin a city treasurer from executing a deed for real estate sold for taxes, which avers that the owner of the property, at the time of the sale, had sufficient personal property in the county out of which the tax could have been collected, is good on demurrer.
Morrison v. *Bank of Commerce*, 335

7. *Same.—Sale of Real Estate, When Owner has Personal Property.*—A sale of real estate for taxes, while the owner has sufficient personal property out of which the taxes could have been satisfied, is void. *Ib.*

8. *Same.—Agreement to Bid Jointly at Tax Sale.—Public Policy.—Fraud.*—An agreement made between two or more persons to bid jointly upon property at a tax sale, if not made to prevent bidding, for the purpose of protecting their own interests, is not fraudulent in law, and will not vitiate such sale. *Ib.*

9. *Same.—Judgment Lien-Holders May Purchase.*—When one holds a judgment lien upon real property offered for sale for taxes, he has the right to pay the taxes, but this right does not impose upon him the duty to pay them, nor does it prevent him from acquiring title to such property by purchase at such tax sale. *Ib.*

10. *Invalid Tax Sale Lien.—Statute of Limitations.*—The right of a purchaser at an invalid tax sale to enforce a lien against the land is barred by the lapse of fifteen years, not by the five years limitation prescribed in the 250th section of the assessment law, for an action to recover the land itself. 1 R. S. 1876, p. 127. *Brown* v. *Fodder*, 491

11. *Same.—Subsequent Taxes.—Voluntary Payment.*—When the right to enforce a lien upon land for the amount bid at an invalid tax sale has been lost by lapse of time, a subsequent payment of taxes on the land will be deemed a voluntary payment, furnishing no cause of action, and ineffective to restore the original right. *Ib.*

12. *Same.—Pleading.—Limitation.—Evidence.*—When, under a complaint in ejectment, the plaintiff seeks, under sections 256 and 257 of the assessment law of 1872, Acts 1872, p. 119 (1 R. S. 1876, p. 129), to enforce a lien for the amount of his bid at an invalid tax sale, the answer of general denial admits proof of all defences, including the statute of limitations. *Ib.*

13. *Tax Title.—Lien.—Auditor's Deed.—Action to Quiet Title.—Harmless Error.*—Where a suit to quiet title is founded upon a purchase of lands for taxes, and there is no evidence of such proceedings as authorize a conveyance, there is no available error in refusing to admit the auditor's deed in evidence, where the judgment rendered gives the plaintiff a lien for the taxes paid by him. *Langohr* v. *Smith*, 495

14. *Assessment.—Misnomer.*—The fact that real estate is assessed for taxation in the name of a person other than the owner, does not invalidate the assessment. *Stiltz* v. *City of Indianapolis*, 582

15. *Same.—Cities and Towns.—Exemption of Property used for Agricultural Purposes.—Statute Construed.*—The act of March 13th, 1877, Acts 1877,

Spec. Sess., p. 74, providing that city or town property used solely for agricultural purposes, etc., shall not be taxed for city or town purposes to any greater extent than lands in the township are taxed for township purposes, is not retrospective in its operation, and does not affect the assessment of such property for city purposes, previously made under existing statutes. *Ib.*

16. *Same.—Injunction.*—An injunction will not be granted to enjoin the collection of taxes if any of the taxes assessed are valid and remain unpaid. *Ib.*

17. *Same.—City.—Power to Assess Taxes for Payment of Interest.*—A city has power to tax all property within its limits subject to state and county taxation for the payment of interest upon its public debt, and property may be taxed for this purpose which has been annexed to the city after the creation of the debt. *Ib.*

TENANCY.

See LANDLORD AND TENANT; REAL ESTATE, ACTION TO RECOVER, 5; WILL, 7.

TENDER.

See INSURANCE, 13; PROMISSORY NOTE, 4, 5; VENDOR AND PURCHASER, 4.

TICKET-SCALPER.

See CRIMINAL LAW, 1.

TIME.

See APPEAL, 2; BILL OF EXCEPTIONS, 3; CHATTEL MORTGAGE, 1.

TITLE.

See CITY, 1; CONTRACT, 7; EVIDENCE, 4; INSANITY, 3, 4; PLEADING, 4, 11; REAL ESTATE, ACTION TO RECOVER, 6; RECEIVER, 2; SHERIFF'S SALE, 13; SPECIFIC PERFORMANCE; TAXES.

TITLE BOND.

See SPECIFIC PERFORMANCE, 3; STATUTE OF FRAUDS; VENDOR AND PURCHASER, 3.

TORT.

See RAILROAD, 1 to 4.

TOWNS.

See TAXES, 15.

TOWNSHIP.

See PROMISSORY NOTE, 15.

Repair of Highways.—Negligence. Damages.—In 1879, a civil township had no such powers conferred or duties imposed upon it as required it to keep in repair the public highways; and hence it was not liable for damages accruing from neglect to do so. *Yeager v. Tippecanoe T'p, 46*

TOWNSHIP TRUSTEE.

See PROMISSORY NOTE, 15.

1. *Settlement. - Mistake.*—When a township trustee fails to keep the accounts required by law, and by reason thereof, and by reason of mislaying a voucher, he fails in his annual settlement with the county commissioners to claim or receive credit for a sum properly paid out by him, he can not afterwards recover for the amount so paid. *Butt v. Jennings School T'p, 69*

2. *Same.—Statute of Limitations.* - When a school township trustee, by mistake, advances money for the school township, which, in his annual settlement, is found to be due to him, and so entered of record, a suit to recover the amount is founded, not upon the record, but upon the advancement of the money, and the statute of limitations begins to run at the date of the settlement, and six years is a bar. *Ib.*

3. *Same.—Complaint.—Demurrer.—Practice.*—A complaint by a township trustee to recover a balance found due him on settlement with the county commissioners, brought after the lapse of six years from the settlement, shows by inevitable inference that the case is not within any of the exceptions to the statute of limitations, and is barred by that statute; and, in such case, the question of the statute is presented by demurrer for the want of sufficient facts. *Ib.*

4. *Defalcation.—Successive Bonds.—Liability of Sureties.—Estoppel.*—The sureties upon a township trustee's official bond are not liable for defalcations which occurred before the bond was given, and are not estopped by the acts, book entries, or reports of the trustee, from showing when a defalcation in fact occurred. *Goodwine* v. *State, ex rel.*, *109*

5. *Same.*—The condition of a township trustee's bond embraces "all moneys belonging to the township," and therefore includes money received from his predecessor in office. *Ib.*

6. *Same.—Use of Township Funds.*—A township trustee is not a defaulter because he invests in his private business money received from public sources, so long as he continues ready to pay out all sums required for public uses, and at the proper time is ready to pay over to his successor the remainder for which he may then be accountable. *Ib.*

7. *Same.—Failure to Pay Over to Successor.*—The failure of a township trustee to pay over to his successor the sum for which he is accountable, though he be his own successor, is a defalcation, for which the sureties upon his first bond are responsible; but if, after entering upon his second term, he make the defalcation good by paying the amount thereof to himself as trustee, he then, with his sureties, becomes liable therefor upon his new bond. *Ib.*

8. *Power of Township Trustee to Execute Note.—Fraud.*—A township trustee has authority to buy school furniture for the school township, and to give the promissory note of the corporation therefor; and payment can not be resisted on the ground that the goods were not needed, and the price too high, unless fraud is shown, nor then without an offer duly made to return the goods. *Johnson School T'p* v. *Citizens Bank, 516*

TRESPASS.

See Real Estate, Action to Recover, 5.

1. *Complaint.—Close.*—A complaint in trespass, alleging that "the defendant unlawfully broke and entered the *close* of the plaintiff, situate" in the county and State, "and took and carried away therefrom two hundred dozen sheaves of wheat, the personal property of the plaintiff, without license so to do, to the damage," etc., is sufficient.
Richardson v. *Brewer, 107*

2. *Same.—Personal Property.—Nominal Damages.*—The unlawful removal of the personal property of another is an injury for which the law gives an action, and from which it implies nominal damages. *Ib.*

TRUST AND TRUSTEE.

See Bankruptcy; Supreme Court, 24; Voluntary Assignment.

TURNPIKE COMPANY.

1. *Pleading.—Complaint.—Corporate Existence.*—In the complaint of a turnpike company, an allegation of the date when its articles of association were filed, sufficiently shows the beginning of its corporate existence. *Washer* v. *Allensville, etc., T. P. Co., 78*

2. *Evidence.—Lost Articles of Association.—Copy.*—Where it is proved that the original articles of association of a turnpike company are lost, the record of the copy filed in the recorder's office may be given in evidence. *Ib.*

3. *Turnpike.—Location.*—The description of a turnpike in the articles of association of the company organized to build it, is a location. *Ib.*

4. *Organization to Purchase Roads.—Statute Construed.*—To organize a turnpike company under the statutes (R. S. 1881, sections 3624 and 3658), there must be a substantial compliance with the requirements prescribed. There can be no such organization for the purpose of purchasing, etc., two or more distinct roads already existing, and owned by different corporations. *State, ex rel., v. Beck, 500*

5. *Same.—Subscription by Initial of Christian Name.*—Articles of association for the formation of a turnpike company may be subscribed by the corporators, by their usual signatures, and the use of initials to designate their Christian names is not objectionable. *Ib.*

6. *Same.—Estoppel.—Quo Warranto.—Estoppel.* That the State has instituted a criminal prosecution for breaking down a toll-gate, described in the indictment as the property of a corporation named, is no bar to an information to contest the valid organization of the supposed corporation. *Ib.*

UMPIRAGES.

See ARBITRATION AND AWARD.

VENDOR AND PURCHASER.

See CONTRACT; FRAUD; FRAUDULENT CONVEYANCE, 2; PROMISSORY NOTE, 10; SPECIFIC PERFORMANCE; STATUTE OF FRAUDS.

1. *Lis Pendens.—Statute Construed.*—The act of 1877, concerning *lis pendens*, Acts 1877, Spec. Sess., p. 54, had no retroactive effect, and therefore did not apply to cases pending when it took effect, nor did it apply to cases in the courts of the United States. *Wilson v. Heglin, 35*

2. *Same.—Notice.*—Before such act a purchaser of real estate, while a suit was pending concerning it, was bound by the result of the suit, when, at the time of the purchase, the nature of the claim upon the property was disclosed by the pleadings. *Ib.*

3. *Title Bond.—Breach of Warranty.—Eviction.—Promissory Note.—Consideration.—Reply.*—To a complaint to foreclose a mortgage the answer was in two paragraphs: 1. That the note was for the last instalment of the purchase-money of the land mortgaged; that the vendor contracted by bond to execute a warranty deed upon full payment of the purchase-money, which had not been tendered; and by paramount title the purchaser had been evicted of one-third of the land. 2. As to one-third of the note, that the consideration has failed because of the eviction of the purchaser from a third of the land by title paramount; that a deed for the vendor's "right, title and interest" in the land was tendered, which the purchaser was persuaded to accept, but not in full discharge of the bond. A reply to both, denying under oath the execution of the bond, and that the deed was executed and accepted and recorded by the purchaser, who has ever since claimed under it, is good on demurrer. *Chrisman v. Chenoweth, 491*

4. *Vendor's Lien.—Complaint.—Deed.—Tender.*—In a complaint to recover purchase-money of real estate and to establish a vendor's lien, an averment that the purchaser has no other property subject to execution is unnecessary, and if the vendor has not conveyed to the purchaser, the absence of an averment that a deed has been tendered is an objection which can be made only by the purchaser. *Evans v. Feeny, 533*

5. *Same.—Lien.—Judgment.—Sheriff's Sale.*—A judgment against a purchaser of real estate having no conveyance, and there being no fraud, is not a lien upon the real estate, and a sale on execution issued on such judgment vests no rights in the purchaser. *Ib.*

VENIRE DE NOVO.

See REFEREE; SUPREME COURT, 9; VERDICT.

VERDICT.

See CHATTEL MORTGAGE, 5; FRAUD; PLEADING, 7; PRACTICE, 1, 13; SUPREME COURT, 9, 12, 18.

1. *Special Verdict.—Venire de Novo.—Practice.*—No finding should be made in a special verdict as to facts upon which there was no evidence, but an issue on which no facts are found should be regarded as not proved by the party having the burden of that issue, and silence as to such issue is not ground for a *venire de novo*. *City of Lafayette* v. *Allen*, *166*

2. *Same.—New Trial.*—If a special verdict ought to have found facts which are not found, the remedy is by motion for a new trial, on the ground that the verdict is contrary to law. *Ib.*

3. *Special Verdict.—Instructions.—Practice.*—Where a special verdict is demanded, it is error to instruct the jury generally concerning the law of the case, but instructions as to the nature of the action and issues, form of verdict and general duties of the jury are proper. *Toler* v. *Keiber*, *383*

4. *Same.—Harmless Error.*—Where a special verdict is demanded, it is error to direct the jury to return also a general verdict, but this will be cured if the court afterwards disregard such general verdict and act only on the special verdict. *Ib.*

5. *Same.—Jury.*—Where a jury return a special verdict which is imperfect by the omission of a formal conclusion, the court may instruct them as to the same, and require them to retire and add it. *Ib.*

VOLUNTARY ASSIGNMENT.

Mortgage.—Married Women.—Equity of Redemption.—A husband and wife joined in a mortgage of the husband's lands to secure his debt, and afterwards he made a voluntary assignment for the benefit of his creditors, under the statute, R. S. 1881, sections 2662 to 2683, a large amount of personal property passing by the assignment. The trustees did not pay off the mortgage, and after a foreclosure and sale of the land under it, they sold the land subject to the mortgage, and the purchaser of the equity of redemption by arrangement with the purchaser at the foreclosure sale, at the instance of the trustees, did not redeem, but took a conveyance from the latter.

Held, that the trustees were not bound to pay off the mortgage or to redeem, and that the wife had no action against them for the proceeds of the sale by them, or otherwise. *Gough* v. *Clift*, *371*

VOLUNTARY PAYMENT.

See MISTAKE; TAXES, 11.

WAIVER.

See APPEAL BOND; ARBITRATION AND AWARD, 2; INSURANCE, 11; REVIEW OF JUDGMENT, 1; SPECIFIC PERFORMANCE, 2; SUPREME COURT, 10, 21.

WARRANTY.

See CONTRACT, 4, 5; PROMISSORY NOTE, 18; VENDOR AND PURCHASER, 8.

WIDOW.

See DECEDENTS' ESTATES, 2.

WILL.

1. *Attestation.*—The attestation of a will thus, "Signed and sealed in the presence of," etc., followed by the signatures of two witnesses, is sufficient in form. *Herbert* v. *Berrier*, *1*

2. *Same.—Execution.*—If one who subscribes a will as an attesting witness is competent for that purpose, he is a fit person to write the testator's name thereto at his request. *Ib.*

3. *Same.—Attesting Witnesses.—Signature.—Evidence.*—Proof, in the absence of a contest, of the genuineness of the signatures of the attesting witnesses, and that they are dead or non-residents of the State, or can not be found, and that they attested it at the testator's request, and in his presence, and that one of them wrote the testator's name at his request, and that the subscribing witnesses in person wrote their own names in his presence, is sufficient. *Ib.*

4. *Same.—Testator's Capacity.—Presumption.—Statute Construed.*—Express proof of the capacity of the testator to make a will, and of his freedom from coercion, when no contest is pending, is not required by the statute, R. S. 1881, section 2587. This, in the absence of proof, is presumed. *Ib.*

5. *Same.—Competency of Witnesses.*—The competency of the attesting witnesses to a will will be presumed until the contrary is shown. *Ib.*

6. *Same.—Pleading.*—A complaint to overthrow a will, which alleges generally that "the will has been admitted to probate unlawfully and without sufficient proof," is too vague and uncertain. *Ib.*

7. *Construction.—Tenants in Common. Partition.*—A will contained the following clauses: "*First.* I give and bequeath to my son, N. T.," certain real estate, describing it. "*Second.* * * To my daughter, A. A., twenty-five dollars in money. *Third.* * * To my beloved wife, R. T., all my land or real estate, of every description whatever, that I own at my death (not devised or given away in this will); also, all my personal property, * * to have, use and control during all her natural lifetime, and after her death * * to my six children, * * except that my son, N. T., is to have an equal share in the personal property with the other children; if any of my said seven children shall die without bodily heirs, then the others to have the share or shares, both real and personal, of the deceased ones, equally divided."

Held, that the third clause does not affect any property disposed of by the first and second clauses.

Held, also, the testator having died leaving a widow and eight children, that upon the death of the widow and N. T. without issue, and subsequently the death of M. T., a son named in the will, leaving an only child, J. T., the land devised by the first clause of the will to N. T. belongs to A. A., J. T., the daughter of M. T., and the brothers and sisters of N. T. as tenants in common, each entitled to a one-seventh part thereof. *White* v. *Allen*, 284

WITNESS.

See Criminal Law, 12; Evidence, 1 to 3; Practice, 2, 7; Promissory Note, 3; Supreme Court, 11; Will, 1 to 6.

Practice.—Separation of Witnesses.—Parties.—Guardian.—The guardian of a minor defendant is within the rule that a party, although a witness, may not be excluded from the court room, under an order for the separation of witnesses. *Cottrell* v. *Cottrell*, 87

WITNESS FEES.

See County Clerk, 1, 2.

WRITTEN INSTRUMENT.

See Contract, 1, 5; Pleading, 4.

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